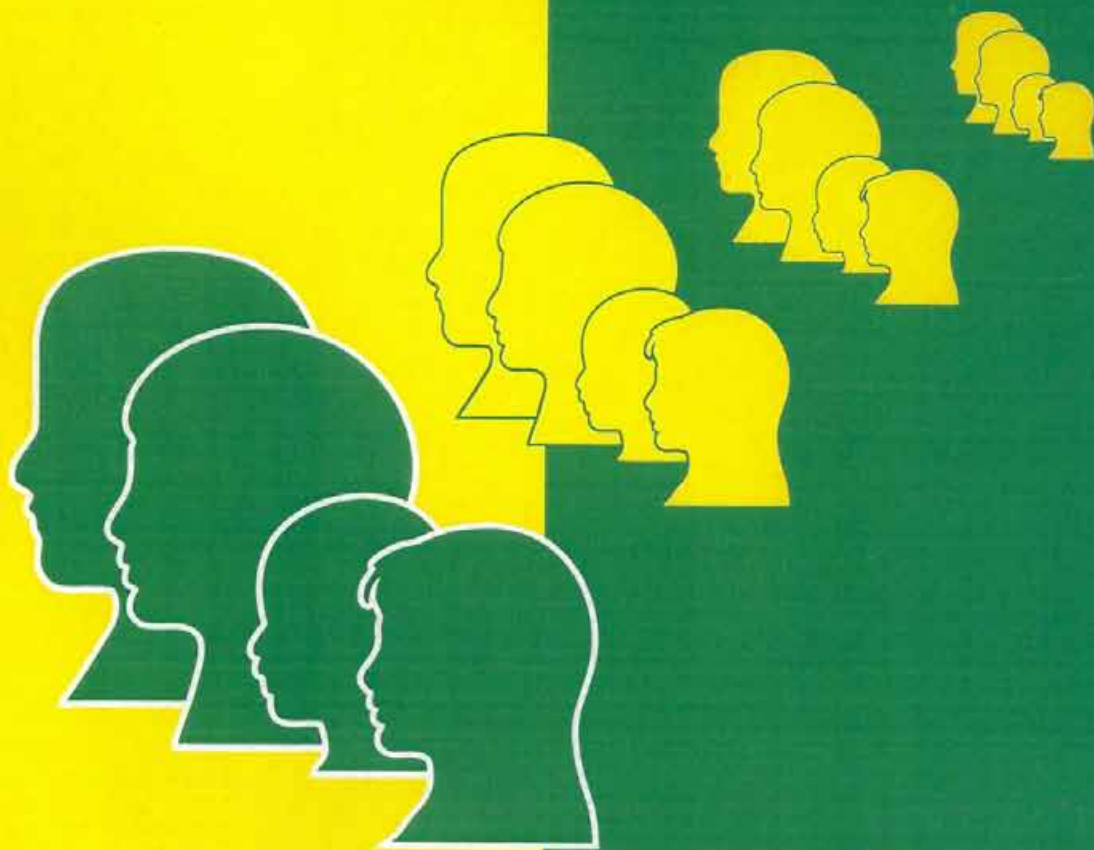


# SOURCE BOOK ON HUMAN RIGHTS



Commission on Human Rights  
Philippines



U.P. National College of Public  
Administration and Governance



UNDP Programme  
Fostering Democratic Governance

# **SOURCE BOOK ON HUMAN RIGHTS**

National College of Public Administration and Governance,  
University of the Philippines (NCPAG-UP)

in cooperation with  
Commission on Human Rights of the Philippines (CHRP)

## MESSAGE

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It is with great pride and pleasure that we welcome the publication of a Source Book on Human Rights. We hope that the publication will stimulate more thinking and exchange of ideas on human rights principles and issues, as well as serve as a stimulus to the development of human rights consciousness and culture in the Philippines.

This collection of articles and papers, all or most of which have been earlier presented in various local and international conferences, can be considered as the first in a series of initiatives aimed at providing an all-around discussion of human rights principles and practices. It also serves as a companion reference material to the other two volumes, namely, the Manual on the Application of RBA (Rights-Based Approach) Systems and Tools and the Orientation Training Manual on the RBA, both of which have been made possible by the partnership between the Commission on Human Rights of the Philippines and the Center for Policy and Executive Development, National College of Public Administration and Governance, University of the Philippines, and the financial support of the United Nations Development Programme (UNDP).

Allow us therefore to extend our sincere appreciation to the UNDP, not only for providing financial support but also for giving human rights the priority that it rightly deserves, and to the following individuals who, in one way or another, contributed to the development of this Source Book, and without whom this book may not have seen publication:

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## PREFACE

This Source Book on Human Rights is a collection of articles, conference and workshop papers, and book chapters, as well as documents and covenants which spell out human rights concepts and principles and try to translate these into practical reality. It is an initial attempt to put together a body of knowledge which can serve as a basic reference material for students, academics, national and local government officials, civil society organizations and other stakeholders and interested parties. It is intended as a modest contribution to the ongoing discussions on people-centered development, in which human rights are an important if not indispensable component.

It may be noted that many of the articles included in the book have already been presented in, or are the outputs of, workshops and conferences attended by human rights practitioners and advocates. The rigor usually associated with more academic-oriented papers has, thus, not been the foremost consideration in their selection. The main challenge in coming up with this Source Book, in fact, has been in selecting and putting together the more foundational and authoritative writings on human rights. Many of the existing books and/or articles on the subject are more thematic in nature (e.g., right to food, women's rights, right to health); they would, in our view, make an ideal supplement to this Source Book. It is hoped that future initiatives will also give more attention to encouraging scholars and human rights advocates to conduct more conceptual-theoretical studies as well as empirically-based case studies on human rights.

The Source Book is divided into four chapters. Chapter 1 gives the reader an overview of the principles and concepts of human rights. Jose W. Diokno, in the first article, "Human Rights Makes Man Human", argues that human rights are the very essence of man: they are what make man "human". These rights are the right to

life, to human dignity, and to develop as a people. Human rights can also be classified as economic, social and cultural rights, on one hand, and civil and political rights, on the other. Human rights are conceptually separable, but they are, according to Diokno, indivisible, in that one or some of them cannot be enjoyed without the others.

Aurora Parong, in her article, "Principles and Practice of Human Rights", starts off by providing a brief background on the origins and evolution of human rights as a concept. She then goes on to discuss in some detail the principles of human rights as these are now embodied in the Universal Declaration on Human Rights and various international covenants and conventions. The realization of these rights, however, depends on the ability of the claimholders to enforce their rights. Carlos Medina, in "What are Human Rights?", also provides a definition of human rights, distinguishing them from other rights. He also traces the roots of human rights in natural law religion and philosophies such as Marxism.

Chapter II lays down the historical and philosophical foundations of human rights.

In "The Rights of the Human", Ton Danenberg argues that human rights, far from being mere philosophical ideas, are in fact the outcome of, or are closely associated with, people's concrete struggles. Examples of such struggles are the French Revolution of 1789, the American Declaration of Independence, the Industrial Revolution, the Russian Revolution of 1917, and the Chinese Revolution of 1949. All these revolutions have been struggles for human rights, even if the paradoxical result in some of them has been the curtailment of these same rights during and after the revolution. In the Philippines, the struggle against the Marcos dictatorship served as the impetus for the current concern for human rights, including the establishment of the Philippine Commission on Human Rights.

Jorge Coquia, in "History, Theories of Sources and Development of Human Rights", retraces the history of the struggle for human rights from the ancient Greeks



through the English Magna Carta of the Middle Ages down to the American Bill of Rights in 1776. These struggles derived their inspiration from religion, natural law, Marxism, positivism and utilitarianism, as well as from theories of justice, equality and human dignity. In more contemporary times, the UN Declaration on Human Rights made human rights an international concern. In the Philippines, struggle for human rights was an important component of the anti-colonial struggle (first against Spanish and later against the US rule) and in the struggle against the Marcos dictatorship.

Chapter III deepens the discussion on concepts and principles by giving the reader a taste of some human rights issues that are the subject of continuing debates. Thus, Sedfrey Candelaria, in "The Philosophy of Human Rights and Emerging Perspectives", addresses the issue of whether there is an eastern as opposed to a western concept of human rights. He notes that, although human rights as embodied in the Universal Declaration may be western in its immediate inspiration, similar concepts can also be found in other great religions (Islam, Confucianism, Buddhism, Hinduism). However, this basic similarity has in recent years been overshadowed by the thesis on "Asian values" - with its emphasis on hierarchy and authority, on society as a whole (as opposed to the individual), and on discipline put forward by some Asian leaders to explain the region's rapid growth. Since it is hard to argue against rapid growth, the thesis had a considerable influence, especially before the Asian crisis which exposed some of the underlying weaknesses of the high-growth economies of East Asia.

Ma. Socorro Diokno, in "State Obligations on Human Rights?", stresses two fundamental obligations of states on human rights, namely, to respect and to protect. The former requires the State to refrain from doing things to curtail human rights, while the latter requires the state to take steps to prevent others from violating individual rights. Both obligations, however, require for their fulfillment availability of resources and willingness on the part of the state.

Evelyn Serrano and Max de Mesa, in "Human Security: A Human Rights Approach to National Security", propose a "human security" approach to human rights. As an approach, it includes not just human rights but education, health, development and national security - it is, in the authors' words, a "people-centered" approach. The human security approach is concretely manifested through such programs/activities as strengthening humanitarian action, respecting human rights and humanitarian law, disarming people and fighting crime, preventing conflict and respecting citizenship.

Vitti Muntarborn's "Asian Perspectives on Human Rights" discusses the various Asian perspectives on human rights, focusing on such issues as universality, indivisibility, and the balance between rights and duties, and also briefly takes up the question of "Asian values" along the way. The major part of the article is, however, devoted to discussing the various programs and efforts (policy, education, training, etc.) to address the issue of human rights at both the international and regional levels. Specific issues that human rights practitioners should address, such as women's and children's rights, refugees' rights, and the rights of internally displaced and migrant workers, minority and indigenous peoples and those with HIV/AIDS, are also suggested by the author.

Success in promoting human rights is ultimately a function of the willingness and capacity of institutions to address human rights issues and to implement the decisions of human rights bodies. Chapter IV, the last chapter, thus brings the discussion on human rights down to the operational level - which is to say, to the organization, functions and programs of the international, regional and national bodies which have been purposely established to promote and protect human rights.

There are four articles that describe the organization, mandates and functions of such human rights institutions. The first article, "Introduction on

International Human Rights Instruments", discusses the provisions and interrelations of the various international human rights declarations, covenants and other agreements, most of which were fashioned during the second half of the 20<sup>th</sup> century. "The UN Human Rights System", the second article, also discusses the role of UN institutions like the International Court of Justice and the Economic and Social Council in the protection and promotion of human rights. Human rights are also protected and promoted through charter-based mechanisms like the Universal Declaration on Human Rights, institutions like the UN Commission on Human Rights and its High Commissioner, and various treaties and covenants, each with its monitoring body or committee. The third article, "National Human Rights Institutions: Background and Overview", provides an overview of the multi-level system of human rights institutions, with the UN at the apex and various regional, nongovernmental and governmental institutions below it. While there is no agreed upon concept of a national human rights institution at the national level, in practice there are such institutions, like commissions, ombudsmen and special institutions for groups which suffer discrimination (e.g., minorities, refugees).

In the fourth article, Chair Quisumbing of the Philippine Human Rights Commission focuses on human rights institutions at the regional level, specifically in the Asia Pacific Region. This includes the Asia-Pacific Forum of National Human Rights Institutions, which was organized for the purpose of fostering dialogue and cooperation among national human rights institutions in the region. The author concludes with a brief discussion of the role and principal concerns of the Philippine Commission on Human Rights, as an illustration on how a national human rights institution functions.

The promotion of human rights is not the sole domain of human rights institutions such as those mentioned in the above selections. Success in institutionalizing human rights perhaps depends as

much, if not more, on their being embedded in the daily routines, processes, activities and systems of governance – in short, in their being "mainstreamed", to use the currently fashionable term.

"Applying Human Rights to Development" thus puts forward a framework and identifies various processes through which the concept of human rights may be embodied or mainstreamed in the development process. The key to mainstreaming human rights is governance which is a process involving government, the private sector and civil society, and is aimed at advancing human development. The second article, "Mainstreaming Human Rights", also provides a framework (including an action framework) for embedding human rights, gender and right to information in the process of governance and development. It also presents a rights-based approach to the development of the informal sector as a case example in mainstreaming human rights.

## TABLE OF CONTENTS

Message

Preface

### CHAPTER 1: Principles and Concepts

Human Rights Makes Man Human  
*Jose W. Diokno* 1

Principles, Concepts and Practice of  
Human Rights  
*Aurore A. Parong* 8

What are Human Rights?  
*Carlos Medina* 33

Human Rights - International and  
Domestic Standards 39

State Obligations on Human Rights  
*Ma Socorro I. Diokno* 48

### CHAPTER 2: Historical and Philosophical Foundations

The Rights of Human  
*Tom Dannenberg* 55

History, Theories of Sources and  
Development of Human Rights  
*Jorge R. Coquina* 73

### CHAPTER 3: Selected Issues and Debates on Human Rights

*A. Universality vs. Cultural Relativism*

Asian Perspective on Human Rights:  
Perceptions, Programmes and Practices  
*Vitit Muntarbhorn* 91

Human Rights in Islam  
*Nasser A. Marohomsatic* 126



Philosophy of Human Rights and Emerging Perspectives <i>Sealfrey Candalaria</i>	136
---	-----

*B. Civil/Political Rights/Economic/Social/Cultural  
(CPR/ESC) Rights Divide*

Human Security: A Human Rights Approach to National Security <i>Evelyn B. Serrano and Max M. de Mesa</i>	152
--	-----

**CHAPTER 4: International and National Institutions on  
Human Rights**

UN Human Rights System	185
Introduction on International Human Rights Instruments	207
National Human Rights Institutions	224
Human Rights Institutions in the Asia-Pacific Region <i>Purificacion C. Valera Quisumbing</i>	236
Right to Development Framework: Mainstreaming Human Rights, Gender and Right to Information in Public Governance and Civil Society	245
Applying Human Rights to Development: Commission on Human Rights' Action Framework on the Rights-Based Approach to Development and Applications in the Commission's Operations and Across Institutions	279

**CHAPTER 1  
Principles and Concepts**

**HUMAN RIGHTS MAKE MAN HUMAN\***

*Jose W. Diokno*

**N**o cause is more worthy than the cause of human rights. Human rights are more than legal concepts: they are the essence of man. They are what make man human. That is why they are called human rights: deny them and you deny man's humanity.

Almost everywhere, human rights are extolled. Yet, almost everywhere, they are violated, and nowhere with less shame than in our country. Here, men in government, aided or abetted by foreign governments, international institutions and transnational corporations, debase the cause of human rights, just as they devalue our currency for ignoble purposes and with pernicious results. At times, they brazenly deny that anyone's rights have been or are being violated. When their denials begin to sound hollow even to themselves, they admit with feigned sorrow that some violations have taken place, yet quickly add that the violations do not reflect policy, but are "aberrations" caused by overzealousness in protecting national security or promoting economic development—as if Filipinos exist for the economy and the state, and not the reverse. Or they dismiss the cause of human rights with impatience, if not contempt, as an imposition of western culture alien to the Filipino soul—as if Filipinos were less human than the men and women of the West. Most often, they raise their right hand in solemn pledge to uphold human rights, but with their

\* Excerpts from a Lecture delivered at a Convocation on Human Rights at Silliman University during its 80<sup>th</sup> Founder's Day, 31 August 1981. Reprinted from Manalang, Priscila S. (ed) *A Nation for Our Children*, Quezon City: Claretian Publications, 1987, pages 1-6.



left hand create situations and bless policies and practices that trample upon these rights.

In truth, the distinguishing mark of government these days is not so much corruption or incompetence as a grim determination to displace the straightforward with the devious, and to smother thought with slogans. That government succeeds partially is due not only to its power over mass media but also to our ignorance: too many of us are not aware of our rights and of the ways we can enforce them. So it is especially urgent that we restore the cause of human rights to its pristine purity and respond to the call which the United Nations has made upon "every individual and every organ of society...(to)...strive by teaching and education to promote respect for these rights and freedoms...and to secure their universal and effective recognition and observance."

Human rights are enumerated in five great international documents and two great national documents.

The international documents are the Universal Declaration of Human Rights, which the United Nations adopted on December 10, 1948; its two implementing covenants: the International Covenant of Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both of which took effect in 1976; the Declaration and Action Programme on the Establishment of a New International Economic Order, and Economic Rights and Duties of States, both of which the United Nations adopted in 1974.

The two national documents are our Malolos Constitution of 1898 and the Philippine Constitution of 1935. The 1973 Constitution has no place on the list, not only because it is of doubtful parentage but also because it contains provisions on executive immunity [Art. VII, Sec. 15]; on the President's right to enter into treaties or agreements, disregarding the constitutional requirement that natural resources be controlled by the Filipino people [Art. XIV, Sec. 16]; the provision validating martial law

acts [Art. XVII, Sec. 3(2)]; and the provision granting the President power to legislate [1976 Amendment 6].

Each of the seven great documents on human rights enumerates more than twenty human rights. Because so many are listed, many of us find it hard to grasp their scope. So let us start with the basics.

First. None of us asked to be born. And regardless of who our parents are and what they own, all of us are born equally naked and helpless, yet each with his own mind, his own will and his own talents. Because of these facts, all of us have an equal right to life, and share the same inherent human dignity. The right to life is more than the right to live: it is the right to live in a manner that befits our common human dignity and enables us to bring our particular talents to full flower. So each of us individually has three basic rights: the right to life, the right to dignity, and the right to develop ourselves. These are traditionally known as the rights of man.

Second. Even if we may not know who our parents are, we are never born without parents, and never live outside society, a society with its own peculiar culture, history and resources. So besides our rights as persons, we have rights as society, rights which belong to each of us individually but which we can exercise only collectively as a people. These rights are known as the rights of the people. They are analogous to the rights of man and, like the latter, comprise three basic rights: to survive, to self-determination, and to develop as a people.

Third. Once a society reaches a certain degree of complexity, as almost all societies do, society can act only through government. But government always remains only an agent of society; it never becomes society itself, it never becomes the people themselves. It is always and only an instrument of the people.

Moreover, since the government is composed of men, each with his own interests and his own frailties, it usually happens – in fact, it happens all too often – that government doesn't seek the people's welfare: on the contrary, it oppresses the people. These facts lead to two

conclusions. One is that when we speak of national security, what we refer or should refer to is the security of the people, not of the governors; and when we speak of economic development, what we are talking about or should be talking about is the improvement of the standards of living of all the people, not the enrichment of the governors. The other conclusion is that, since government is merely an agent of the people, people have the right to change both the men who run the government and the structure and system of government itself; and when the people cannot do so peacefully, they have the right, in the language of the preamble to the Universal Declaration of Human Rights, "to have recourse, as a last resort, to rebellion against tyranny and oppression."

All the rights of man and all the rights of the people stem from those three basic principles.

From man's first basic right – his right to life – spring our rights to health, to own property, to work, to form trade unions and to strike, to social security, to rest and leisure, to move about freely within our country and freely to leave and return to it, to marry, to establish a family and to exercise the rights of parents.

Analogously, the right of the people as a people to survive is the source of our people's rights to peace, to non-aggression, and to share in international trade, receiving a just price for our products and paying no more than what is fair for the products of other countries.

Man's second basic right – his right to human dignity – is the source of our rights to recognition everywhere as a person, to honor and reputation, to freedom of thought, of conscience, of religion, of opinion and expression, and to seek, receive and impart information, to peaceful assembly with our fellows, to equal treatment before the law, to privacy in our family, our home, and our correspondence, to freedom from slavery, torture and cruel, inhuman or degrading punishment, as well as from arbitrary arrest, detention or exile, to be presumed innocent of crime or wrong, to fair trial, and so forth.

The analogous right of the people to self-determination is the root of our people's rights to

sovereign equality in international affairs and international organizations, to freedom from all forms of racial discrimination, to political independence and freedom from colonialism, neo-colonialism, alien domination and intervention in our national affairs, to sovereignty over our natural resources and over all economic activities, to control the activities of foreign investors and transnational corporations, and to nationalize and expropriate their assets, and freely to choose and change our political, social, cultural and economic systems.

Man's third basic right – his right to develop – is the source of our rights to an education, to share in the cultural life of our community, to form associations with our fellows, and to live in a national and international order that allows all of our rights to flower and be respected.

Similarly, the people's right to develop as a people implies the rights freely to choose the goals and means of development, to industrialize the economy, to implement social and economic reforms that ensure the participation of all the people in the process and benefits of development, to share in scientific and technological advances of the world, and as a former colony, to reparation and retribution for the exploitation to which we have been subjected.

No one has ever doubted that the rights of the people are all of a piece. Equally so are the rights of man. But for convenience, the rights of man have been divided into two broad kinds: economic, social and cultural rights on the one hand, and civil and political rights on the other. This distinction has led to much argument about which kind should be given priority and whether one kind can be sacrificed for the other. My experience has convinced me that these arguments are silly. As a lawyer for small farmers, fishermen, workers, students and urban poor, many of whom have been detained, most of whom have been threatened with detention, a few of whom have been shot and wounded when they were peacefully exercising their rights of assembly, I have



learned the painful lesson that we cannot enjoy civil and political rights unless we enjoy economic, cultural and social rights, anymore than we can insure our economic, cultural and social rights unless we can exercise our civil and political rights. True, a hungry man does not have much freedom of choice. But equally true, when a well-fed man does not have freedom of choice, he cannot protect himself against going hungry.

A more useful distinction than between economic and political rights is this: that some of man's individual rights are absolute, others are not. Rights which are absolute cannot be limited in any way under any circumstances, even under the gravest of emergencies. Such are, for example, the rights to freedom of thought, of conscience, of religion, to be everywhere recognized as a person, to be free from torture and from cruel, degrading and inhuman treatment, and of course, the right not to be deprived of life arbitrarily. Not only may these rights never be denied, but also nothing justifies imposing any limitation on them.

On the other hand, other rights may be, and in fact must be, limited to preserve social life. Such are, for example, the right to freedom of expression, freedom of assembly, and freedom of association. To be valid, however, limitations placed on these rights must meet three conditions: first, they must be provided by law, not by executive whim; second, they must be necessary to preserve society, or protect public health, public morals, or similar rights of others; and third, they must not exceed what is strictly necessary to achieve their purpose.

These rights and some others – such as, for instance, the rights to be free from arbitrary detention and arrest and the right to a remedy for every violation of fundamental rights – may even be denied in times of grave emergency. But to justify such a denial, the emergency must be so grave that it truly threatens the life of the nation; the existence of the emergency must be publicly proclaimed; and the denial may go no farther than is strictly required by the exigencies of the situation.

## JOSE W. DIOKNO

Generally regarded as the father of human rights advocacy in the Philippines, Diokno is also one of the country's most brilliant legal minds and outstanding statesmen. Diokno came to national prominence when, as Secretary of Justice under President Diosdado Macapagal, he aggressively pursued the case against Harry Stonehill, a highly influential American businessman who was suspected of tax evasion and other crimes. His move against the previously untouchable businessman cost Diokno his job, but launched him into a lifelong campaign for human rights, civil liberties, nationalism and other causes.

When martial law was declared by Marcos in 1972, Diokno was at the forefront of the opposition to the dictatorship, and was imprisoned for two years without any charges being filed against him. Upon his release from prison in 1974, he immediately organized the Free Legal Assistance Group (FLAG), considered as "the first truly free legal service in the country" for the helpless victims of martial law. He also revived the Civil Liberties Union, which had earlier been disbanded, to continue the protest against the constitutional transgressions of martial law and to espouse nationalist causes.

After the EDSA people power revolution in 1986, Diokno was appointed chairman of the Presidential Committee on Human Rights as well as the government panel which was tasked to negotiate for the return of rebel forces to the fold of the law. However, after the "Mendiola massacre" in January 1987 in which 15 farmers died during a rally, Diokno resigned from his two government posts.

A lawyer and a certified public accountant, Diokno topped both the CPA board and the bar examinations in 1940 and 1944, respectively. As a member of the Philippine Senate, Diokno earned the distinction of being honored as outstanding senator for four consecutive years.

Diokno died in 1987. A presidential proclamation commemorating the 17<sup>th</sup> death anniversary of his death cites his public life as "a testimony of his steadfast struggle against the dictatorship and his valiant fight for the preservation of the country's democratic institutions." Diokno's legacies are kept alive through the Jose W. Diokno Foundation, a non-partisan organization which aims to promote the nationalistic and libertarian ideals and values of the late senator. FLAG also continues to provide free legal assistance and education to the victims of human rights violations who cannot afford to avail of these services.

## PRINCIPLES AND PRACTICE OF HUMAN RIGHTS<sup>1</sup>

Aurore A. Parong, M.D.

*"...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world..."*

*"...it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law..."* *---Preamble Universal Declaration of Human Rights (UDHR) 10 December 1948*

The quote from the Universal Declaration on Human Rights underscores the significance of human rights as the foundation of freedom, justice and world peace.

### Human Rights As A Concept

Human rights are freedoms and entitlements inherent to all human beings. There is no requirement to have human rights other than that of being human. There is recognition that each human being has the capability to develop fully one's potentials. Everyone has human rights without distinction as to race, color, sex, language, religion, political belief, national or ethnic origin, and property, social or other status.

The concept of human rights did not start with the Universal Declaration of Human Rights (UDHR) in 1948, although the UDHR is one of the more popular 20th century documents on human rights. Peoples have been concerned with rights and freedoms since ancient times. Mary Robinson, former UN High Commissioner for Human Rights, declared: *"Human rights are inscribed in the hearts of people; they were there long before lawmakers drafted their first proclamation."*<sup>1</sup> In early civilizations, codes evolved either as efforts to ensure treatment of fellow humans with dignity in order to have good community

or in relation to religions. Initially, there were the Code of Hammurabi, the Old and New Testaments, the Koran and others.<sup>2</sup> The Greeks conferred political rights to free male citizens while the Romans talked of rights of citizens as early as 27 B.C.

Rights were later related to natural law, where rights belonged to a person by nature and were bestowed on kings and other authorities like the Church. Abuse of these rights and authorities were however rampant and people opposed such official misconduct. In Britain, the king was forced to sign the Magna Carta in 1215. The Magna Carta forbade official misconduct and incorporated principles of due process and equality before the law, among others.<sup>3</sup>

The concept of human rights evolved to the "Rights of Man". The French had the Declaration of the Rights of Man and the Citizen in 1789 while the Americans had the US Bill of Rights in 1791.<sup>4</sup>

In the aforementioned declarations and documents, rights were recognized, but primarily for men and citizens. There was exclusion or discrimination of women, people of color, non-citizens and some members of certain economic, social, political or religious groups. Slaves were also being traded in many countries.

*"Nevertheless, oppressed people throughout the world have drawn on the principles these documents express to support revolutions that assert the right to self-determination."*<sup>5</sup>

During World Wars I and II, horrific abuses of men and women against other men and women as well as nations against other nations occurred, a few of which were the Rape of Nanking, the Holocaust, and the bombing of Nagasaki and Hiroshima. Learning lessons from the past horrors of war, small and big nations came together in 1945 to establish the United Nations (UN) with the primary goal of preventing war, maintaining peace and security, and promoting social progress. Nations of the world declared in the UN Charter:

<sup>1</sup>An updated and expanded version of a talk delivered during the Multi-sectoral Forum on the Popularization of the Paris Principles in the Context of RBA to Governance and Development, February 2004.



*"We, The Peoples of The United Nations, determined to save succeeding generations from the scourge of war...reaffirm our faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...unite our strength to maintain international peace and security, and... to employ international machinery for the promotion of the economic and social advancement of all peoples..."*<sup>6</sup>

During World War II, the term "Rights of Man" was recognized as discriminatory against women, thus the term "human rights" was adopted.<sup>7</sup> In 1948, 48 members of the UN adopted the Universal Declaration of Human Rights (UDHR) thus:

*"The General Assembly, Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations..."* (Preamble of the Universal Declaration of Human Rights)<sup>8</sup>

A declaration is not legally binding, but it has a moral force to guide peoples in their actions.

Several principles embodied in the UDHR have been internationally accepted and, in fact, incorporated in the Constitutions of more than 185 member countries of the UN. The UDHR has achieved the status of customary international law.

Subsequently, international conventions or treaties were drafted, adopted and ratified, then entered into force, incorporating the rights included in the UDHR. Treaties are legally binding to States or parties that have ratified or acceded to them.

*"The formal expression of inherent human rights is through international human rights law. A series of international human rights treaties and other instruments have emerged since 1945 conferring legal form on inherent human rights...International human rights law consists mainly of treaties and customs, as well as, inter alia, declarations, guidelines and principles..."*<sup>9</sup>

The international human rights law serves as a basis for the legal obligations of states regarding human rights and thus also serves as the basis for justiciability of any of the human rights.

Eighteen years after the adoption of the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted in 1966. These two treaties were opened for signature and later entered into force in 1976 after sufficient ratification by states. The UDHR, the ICCPR and the ICESCR are now commonly called the International Bill of Rights.

There are seven core international human rights conventions. They include the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), ICCPR, ICESCR, Convention for the Elimination of Discrimination against Women (CEDAW), Convention against Torture and other Forms of Cruel, Inhuman and Degrading Treatment and Punishment (CAT), Convention on the Rights of the Child (CRC) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW).<sup>10</sup>

ICERD, which entered into force on 4 January 1969, was an effort to give protection to peoples, especially those of color, against racial discrimination. To further emphasize the need to eliminate discrimination against women, the CEDAW entered into force on 3 September 1981. The CRC, which entered into force on 2 September 1990, provides for special safeguards, care and appropriate legal protection for a child.

As discrimination and human rights violations continued, more conventions and declarations on human rights were adopted, always because of efforts and struggles of peoples and nations to further codify rights in order to provide standards and legally binding instruments which individuals and peoples can use to demand their human rights from States.

Human rights evolved to include not only individual rights but also rights of groups and collectives. The

ICCPR and the ICESCR have articles providing for specific rights. Both human rights treaties have in common Article 1, which integrates the collective rights of peoples to self-determination and not to be deprived of means of subsistence. The Declaration on the Right to Development and the ICRMW specifically codify collective rights.

### Principles and Practices of Human Rights

The principles of human rights are embodied in international human rights laws such as the International Bill of Rights as well as other human rights declarations and conventions. Some of the human rights principles are universality, non-discrimination, indivisibility, interdependence, non-derogability of rights, state obligations on human rights and justiciability of human rights.

Actual experiences of peoples and current issues will be elaborated upon to concretize the practice of these principles, especially post September 11, 2001 and within the context of globalization.

#### *Universality, Equality and Non-discrimination*

The words or terms "All" and "Everyone" used in the UDHR and other human rights documents denote the principle of universality of all human rights. It is further underscored by the phrases "without any discrimination" and "without distinction." Article 1 of the UDHR states that "All human beings are born free and equal in dignity and rights."

Article 2 of the UDHR further states:

"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

This principle of universality of human rights has been challenged in various parts of the world, including Asia. The concept of "cultural relativism" and "Asian values" were put forward by Asian government officials led by Lee Kuan Yew of Singapore when arguing for restricted civil rights which he said was necessary to push for economic growth.<sup>12</sup> Singapore's economic progress was used as a strong argument for human rights trade-offs. The Lee Kuan Yew model was adopted by Prime Minister Mahathir of Malaysia and started in the Philippines by President Ramos with the hopes of becoming part of the newly industrialized countries in Asia. The discourse on universality and "cultural relativism" in Asia was however relegated to the periphery when the financial crisis struck the Asian miracle economies.

Muslim groups publicly declared responsibility for the attacks on the twin towers of New York in September 11, 2001 which resulted in the deaths of about 3,000 men and women of various origins. It has recently been noted that racial and religious profiling has been a key factor in the arrest and detention of Muslims as terrorism suspects in the Philippines and other parts of the world. In airports, discrimination against Muslims or people from the Middle East have been noted, as they are usually subjected to very stringent security measures before they are allowed to board any airplane, while Caucasian non-Muslims do not suffer from the same treatment.

This has also resulted in violations of their rights to practice their own Islamic religion. "In detention centers around the world, the United States has been humiliating Muslim prisoners by offending their religious beliefs," according to Reed Brody, special counsel of Human Rights Watch (HRW). HRW stated that, in 2002, "US Secretary of Defense Donald Rumsfeld authorized a list of techniques for interrogation of prisoners at Guantanamo which included 'removal of all comfort items (including religious items)', 'forced grooming (shaving of facial hair, etc.)', and 'removal of clothing.' Each of these practices is considered offensive to many Muslims. These techniques were later applied



in Afghanistan and Iraq as well." <sup>12</sup> It is against the religious belief of Muslims to eat pork, but, in the Philippines, a Muslim detainee informed his wife that he was given food "contaminated" with pork. <sup>13</sup>

Equal rights for women and men are recognized in many of the human rights declarations and treaties. Both the ICCPR and the ICESCR have expressly provided for equal rights of men and women to enjoy human rights in Article 3 of each convention. ICCPR states:

*"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."*

ICESCR, for its part, states:

*"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."*

Nevertheless, some of the human rights instruments continue to have language that only refers to the male. This is an indication of the level of integration of the principle of non-discrimination between women and men in the documents, and an indication of the comprehensive understanding of the State representatives and writers of the documents of the principle of non-discrimination at the time that the human rights declarations and conventions were adopted. Article 6 Section 1 of the ICCPR states:

*"Every human being has the inherent right to life... No one shall be arbitrarily deprived of his life." (underscoring ours)*

Article 8, Section 1 of the ICESCR states:

*"The States Parties to the present Covenant undertake to ensure: a) the right of everyone to form trade unions and*

*join the trade union of his choice, subject only to the rules of the organization concerned..." (underscoring ours).*

Some of the later human rights documents use neutral language to show non-discrimination based on sex. This includes the Declaration on the Right to Development. Human rights advocates assert that the earlier documents, even if they use politically incorrect language, have explicitly rejected discrimination based on sex.

There is a recognition that inequality between women and men and discrimination against women continue to exist. Article 4, Section 1 of CEDAW clarifies that: *"Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."* <sup>14</sup> These temporary special measures are now commonly called affirmative actions to promote and fulfill the rights of women.

#### *Inalienability and Non-derogability of Human Rights*

Human rights are inalienable, that is, no one's rights may be taken away other than in specific situations and as provided for by law. The exercise of human rights may be limited or derogated (temporarily suspended) by States but limitations are exceptions rather than the rule. These limitations have to be provided for in the legal system of the State Party to the human rights conventions. Thus, Article 4, Section 1 of the ICCPR states:

*"In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures*

are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

Even in situations where States may derogate from their obligations, the ICCPR provides protection to persons whose rights were limited, such as prisoners or detainees. Article 9 of the ICCPR states:

*"Section 2: Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."*

*Section 3. Anyone arrested or detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release...*

*Section 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."*

There are many recent cases showing violations of the aforementioned rights of a person deprived of liberty and these have been justified in the context of the fight against terrorism. In a public forum organized by Task Force Detainees of the Philippines (TFDP) on August 17, 2005, a woman reported the case of a terrorist suspect Muslim detainee at Camp Bagong Diwa, Metro Manila, who has been in detention for two years without charges.

As of October 28, 2002, Amnesty International reported that there were 625 detainees at Camp X-ray in Guantanamo Bay, Cuba and many of them have not been charged and have been denied access to counsel.<sup>15</sup> The detainees who are foreign nationals were considered "enemy combatants" by the Bush administration and therefore "were not entitled to the usual rights of prisoners of war set out in the Geneva conventions. Government officials also claimed that enemy combatants are not even allowed the

constitutional protections given to ordinary criminal suspects. The Administration stated that only the president has the authority to order detention of enemy combatants, and the courts have no business reviewing President Bush's decision on this matter."<sup>16</sup> The U.S. government also argued in court, to justify detention without charges of an American accused of conspiring to detonate a bomb, that "Neither the Constitution nor the laws of war confer a right to counsel to an enemy combatant to challenge the fact of his wartime detention".<sup>17</sup>

The US Supreme Court in two separate rulings declared however that the rule of law should be maintained and the judiciary plays a crucial role in "protecting detainees' basic rights and liberties."<sup>18</sup> The Supreme Court stated that the American courts have jurisdiction over the Guantanamo detainees and that the detainees can ask for judicial review of their detention. The Court also ruled that the US citizens who were suspected terrorists are entitled to challenge detention and have the right to access to counsel.<sup>19</sup> The interpretation and implementation of the US Supreme Court decisions are currently still being debated upon in the courts.

Article 4, Section 2 of the ICCPR provides that some rights may not be derogated. The non-derogable rights include the right not to be arbitrarily deprived of life (Article 6, ICCPR), freedom from torture and ill-treatment (Article 7, ICCPR), freedom from slavery and servitude (Article 8, ICCPR), right not to be imprisoned for debt (Article 11, ICCPR), right against retroactive penalty (Article 15, ICCPR), right to recognition before the law (Article 16, ICCPR) and the right to freedom of thought, conscience and religion (Article 18, ICCPR).

Freedom from torture, a non-derogable right, has been, and is being, violated, especially after the September 11, 2001 attacks in New York. Torture at the Abu Ghraib prison in Iraq came to public attention in the early part of 2003, with digital photographs of detainees naked on top of each other and in psychological distress due to fear of dogs, among others. Some US



soldiers based in Abu Ghraib prison have been convicted of prisoner abuse in 2004 by a Military Commission after the scandal broke out. In a report, "Getting Away with Torture? Command Responsibility for the US Abuse of Detainees," Human Rights Watch called for an investigation of the responsibility of US Secretary of Defense Rumsfeld, Former CIA Director Tenet and General Sanchez and Miller in the torture and abuse of detainees in Guantanamo Bay, Abu Ghraib, and other parts of Iraq. It seems that low-ranking US soldiers were made the sacrificial lambs of the US government, with top officials getting away with torture.<sup>20</sup>

In the Philippines, from January 2002-December 2004, 56 cases of torture were documented by Task Force Detainees of the Philippines (TFDP). TFDP reported 135 victims, 10 of whom were women, in these cases. Most of the victims were suspected armed rebels or were suspected to have been involved in bombing activities, though many of the latter have been released due to insufficiency of evidence. Methods of torture include the use of plastic bag to cover the head and suffocate the victim, electrocution, strangulation and beatings.<sup>21</sup>

#### *Indivisibility and Interdependence of Human Rights*

The principles of indivisibility and interdependence of human rights are not congruent with recognition of some rights and rejection of others. The fulfillment or violation of one or some rights affects some other rights either in their fulfillment or their violation. There are no hierarchies in human rights. All human rights are of the same level and importance.

The ratification records of human rights treaties show that many countries put hierarchies on the different rights. The records further give us a clue on the views and practices of countries related to the principles of indivisibility and interdependence of human rights.

Some States Parties to the ICCPR which recognize civil and political rights have not ratified the ICESCR. Malaysia and Indonesia have ratified the CEDAW and the CRC but have not ratified the ICCPR and the ICESCR.

Burma (Myanmar) and Singapore have only ratified the CEDAW and CRC. The Philippines has ratified the ICCPR, the ICESCR, CEDAW, CRC, CERD and Convention for the Protection of Migrant Workers,<sup>22</sup> but the practice of the Philippine government has shown that it has not been very serious in fulfilling its obligations related to the human rights treaties.

The writers of the UDHR recognized the interdependence and indivisibility of human rights and therefore incorporated the different rights in only one document, the Universal Declaration of Human Rights. Articles 3-21 of the UDHR state the civil and political rights while Articles 22-27 speak of economic, social and cultural rights.

A worker's right to join trade unions, freedom to assemble and freedom to speak about poor working conditions are critical to his/her enjoyment of the right to just wages and better working conditions. A worker's right to a standard of living including, food, housing, health services and others are interdependent with the worker's right to just wages.

It is important for peasant leaders to have their freedom of expression respected during their struggle for the fast implementation of genuine agrarian reform in the Philippines, which is an effort to assert their right to an adequate standard of living.

#### **Normative Content of Human Rights**

The normative content of human rights includes both freedoms and entitlements. The treaty bodies have defined the normative content of human rights through their General Comments. In Article 19, Section 2 of the ICCPR, the right to freedom of expression includes "the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." It also includes an entitlement of the individual to the protection of the States Party from other persons or corporations that may take this right from the individual.

The UN Committee on ESCR has defined in its General Comment No. 4 the content of the right to adequate housing, which is derived from the right to an adequate standard of living. The Committee stated that there are certain aspects of the right to adequate housing that must be taken into account in any particular context and these are now known as the core content or key elements of the right to adequate housing. These include seven elements: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy. Thus, the right to housing is not interpreted in its narrow sense.<sup>23</sup>

Some of the key elements of the right to adequate housing are incorporated in a domestic law in the Philippines, the Urban Development and Housing Act.<sup>24</sup> The incorporation of the normative content of a human right in domestic law facilitates the seeking of remedies at the States' Parties' courts.

In the monitoring of the status of the rights in any country, the normative content of the right has to be looked into in relation to the state's obligations.

#### *State Obligations*

In human rights, the human person is the rights holder or claim holder while the state is the duty holder.

Some human rights advocates are trapped with the myth that classifies rights into negative and positive rights. On the one hand, civil and political rights are said to be negative rights and of immediate effect, and the state has the obligation to respect such rights. On the other hand, economic, social and cultural rights are positive rights and thus the state has an obligation to fulfill progressively. This perhaps emanates from the differences in formulations of Article 2 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The simplistic differentiation between the two sets of rights must be discarded because the trinity of state obligations

is true of all human rights. It must, however, be recognized that they do have differences.

#### *Obligations to Respect, Protect and Fulfill Human Rights*

For every human right, state parties who have ratified or acceded to the convention incorporating the right have three fundamental legal obligations: to respect, protect and fulfill the human right.

The obligation to respect requires the state to refrain from doing anything to violate the integrity of individuals. It is a prohibition against state action and interference depriving an individual from enjoying human rights. Any detainee, including those prisoners of war and those terrorism suspects, should enjoy the non-derogable right to be free from torture. State agents who arrested and/or detained them must not do any act that is cruel and inhuman, whether in times of war or peace. The obligation to respect the universal right to primary education prohibits the withdrawal of resources necessary for the functioning of an elementary school in a village resulting to non-enjoyment of the right to primary education by the children in that village.

The obligation to protect refers to state actions to prohibit third parties or others from violating a person's rights. This is usually through policy and legislative measures that regulate actions of third parties to ensure protection of the human rights of individuals.

The state has the obligation to regulate cost of oil sold by companies in order to protect the general public from excessively high prices. This obligation to protect is especially significant since the track record of big multinational companies which control the production and distribution of oil and its by-products has been such that big profits are foremost in their considerations. Thus oil prices spiral and also result to high prices of all commodities. The oil deregulation law in the Philippines allowed the Philippine government to abdicate its obligations to protect.

The Philippine government's decision to allow regional wage boards to determine workers' wages which



are very clearly below the necessary income to live a decent life is a violation of its obligation to protect workers from unjust wages by corporations and big business.

The obligation to fulfill requires states to take the necessary steps to adopt laws and other measures to give effect to the rights provided in the conventions.

Some human rights academics consider that there are four state obligations on economic, social and cultural rights, including the obligation to respect, protect, progressively realize and provide economic, social and cultural rights.<sup>25</sup> Others, however, include the "obligation to progressively realize" and "obligation to provide" as parts of the obligation to fulfill.

The obligation to fulfill usually requires a state to promote and facilitate the enjoyment of rights. The other aspect of the obligation to fulfill is the "obligation to provide" economic, social and cultural rights. This obligation to provide exists during natural disasters, wars and crisis situations where the individuals, peoples and communities live in circumstances where they cannot secure these rights. Thus the States directly provide goods and services in order that the individuals may enjoy their rights.

The ICESCR states that: "Each State Party... undertakes to take steps... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights... by all appropriate means..." (Article 2 of ICESCR). The UN Committee on ESCR explained that "The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be achieved in a short period of time". However, it explicitly declared that "Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant." <sup>26</sup>

#### Minimum Core Obligation

The UN Committee on Economic, Social and Cultural Rights, in its General Comment No. 3, elaborated that:

*"while great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect."* <sup>27</sup>

It is true that limitations of resources usually have great implications on the progressive realization of economic, social and cultural rights, but the "obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available." <sup>28</sup> Thus, states cannot use limited resources as an excuse for not immediately taking steps to fulfill their obligations on economic, social and cultural rights.

The UN Committee on Economic, Social and Cultural Rights (CESCR) declared that:

*"a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant."* <sup>29</sup>

Non-government organizations (NGOs) in the Philippines have concluded, in a report to the UN Committee on ESCR, that "the Philippine State failed to ensure nutritionally adequate food for many of its citizens especially children and women. Malnutrition has remained a problem in the Philippines, affecting a high proportion of the country's population..." The NGOs noted that in 2001, 6.7 million were underweight and 7.5 million among 0-10 year old children were stunted. <sup>30</sup> The Committee on ESCR further stated that the obligations of State Parties to the ICESCR include obligations of

conduct and obligations of result. Thus States Parties are monitored on how they act and on the results of their actions related to human rights.

### Justiciability and Human Rights Violations

Human rights violations occur when a State fails to fulfill its obligations to respect, protect and fulfill human rights. Violations of human rights may be by commission or by omission.

For all human rights, violations occur when a state withdraws or removes existing human rights protections or when there is discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status with the aim or effect of nullifying the equal enjoyment of any human rights. In relation to economic, social and cultural rights, violations also occur when states fail to satisfy "*minimum essential levels of the rights*" irrespective of the availability of resources in the country concerned.

It is essential to distinguish between **unwillingness** and **inability** of States Parties to fulfill their obligations related to human rights. When a State is unwilling to fulfill its obligations, this situation is an outright violation of human rights. It is the responsibility of the State to prove inability to fulfill obligations.<sup>31</sup>

Even as the States Parties have the primary obligations related to human rights, the international community of nations plays a very significant role. When a State is unable to fulfill its obligations, international assistance to the **unable State** is most important.

There is a growing recognition that non-state actors can violate human rights. A manual on human rights monitoring produced by the UN uses the phrase "human rights abuse" as a broader term than "human rights violations" to include violative conduct committed by non-state actors. . . .<sup>32</sup>

When human rights violations occur, there is a right to remedy for such violations. Remedies are possible courses of action to seek redress and justice for victims

of human rights violations. These may be done at the domestic and international levels.

Article 2, Section 3 of the ICCPR states:

"Each State Party to the present Covenant undertakes:

- a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- b) to ensure that any person claiming such a remedy shall have the right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- c) to ensure that the competent authorities shall enforce such remedies when granted."

It is very clear from the aforementioned that civil and political rights are justiciable.

Economic, social and cultural rights are also justiciable. There are continuing debates, however, about justiciability of economic, social and cultural rights.

The UN Committee on ESCR made some statements regarding the matter but did not categorically resolve the issue of justiciability as an indispensable element of economic, social and cultural rights. In its General Comment No. 3 (1990), the Committee on ESCR stated:

"5. Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable..."<sup>33</sup>

Nevertheless, Steiner and Alston noted that:

"The extent to which these rights (equal rights of men and women, equal pay for equal work, the right to free, compulsory, primary education, etc...) are actually justiciable varies considerably from one country to another.



Nevertheless, that is sufficient to demonstrate that the rights in question are not intrinsically non-justiciable."<sup>34</sup>

Under international human rights laws, States Parties to human rights treaties have the obligation to take effective administrative, judicial and other measures to respect, protect and fulfill human rights and prevent violations.

There are reported cases where individuals or groups have sought remedies at judicial courts regarding the rights to housing, education, health and other rights in countries like India, Guatemala, South Africa and the Philippines. Justice for violations of economic, social and cultural rights is easier to seek at the national courts if there are domestic laws regarding the specific rights.

The United Nations has established mechanisms for reporting on the implementation of human rights treaties and complaints. These include the treaty bodies and extra conventional measures. The treaty bodies specifically monitor and review complaints about the rights provided for in the treaty which created them. For example, the UN Human Rights Committee monitors and reviews complaints related to the implementation of the ICCPR while the UN Committee against Torture monitors and reviews complaints on the implementation of the Convention against Torture. Extra conventional measures were established by the UN Commission on Human Rights and these include Special Rapporteurs and Working Groups.<sup>35</sup>

### Challenges and People's Actions

In our country and in the world today, we experience or observe continuing human rights violations, by omission and/or commission, and despite legal obligations of states to respect, protect and fulfill human rights. Justice for victims of human rights violations is usually elusive. We have to remember the victims of martial law in the Philippines, who until now await official government recognition and justice, 19 years after the ouster of Ferdinand E. Marcos.

Individuals and peoples play very significant roles in the continuing assertion, defense and promotion of human rights. Human rights NGOs and other civil society groups need to take local and international actions for human rights. It is essential for peoples to continually struggle for the realization of all human rights for all.

### Endnotes

<sup>1</sup><http://www.unicef.org/ctc/convention>. [accessed 25 August 2005].

<sup>2</sup>University of Minnesota Human Rights Center, Peace Resource Center, Human Rights Time Line. Available from: <http://www1.umn.edu/humanrts/peace/peaceedu/binder2.html>. [accessed 25 August 2005].

<sup>3</sup><http://www.hrweb.org>. [accessed 20 August 2005].

<sup>4</sup>University of Minnesota Human Rights Center, Peace Resource Center, Human Rights Time Line. Available from: <http://www1.umn.edu/humanrts/peace/peaceedu/binder2.html>. [accessed 25 August 2005].

<sup>5</sup>"A Short History of Human Rights" (1993) adapted from David Shiman, *Teaching Human Rights*, Denver: Center for Teaching International Relations Publications, University of Denver, pp. 6-7.

<sup>6</sup>The Charter of the United Nations was signed in San Francisco, USA on June 26, 1945.

<sup>7</sup>History: Human Rights Time Line. Available from: <http://dcc2.bu.edu/refugees/history>. [accessed 25 August 2005].

<sup>8</sup>Department of Public Information of the United Nations (1995) *The United Nations and Human Rights, 1945-1995*, Blue Book Series, Volume VII, New York. The Universal Declaration of Human Rights (UDHR) was adopted in Paris on December 10, 1948 with 48 votes to none and 8 abstentions.

<sup>9</sup>United Nations, *Human Rights Handbook for UN Staff*, page 3.

<sup>10</sup>Office of the UN High Commissioner for Human Rights, *International Law, The Core International Human Rights Instruments and their Monitoring Bodies*. Available from: <http://www.ohchr.org/english/law/index.htm>. [accessed 15 August 2005].

<sup>11</sup> Aurora Parong (1998) 'Democratizing Development in the Philippines and Southeast Asia', *Trocare Development Review*, Dublin, page 65.

<sup>12</sup> Human Rights Watch (2005) New York: Religious Humiliation of Muslim Detainees Widespread, May 19. Available from: <http://hrw.org/english/docs/2005/05/19/usdom10981.txt.htm>. [accessed 10 August 2005].

<sup>13</sup> Max M. de Mesa and Aurora A. Parong (eds) *Blood Stains the Arroyo Government: Human Rights Under the Arroyo Government*, Task Force Detainees of the Philippines (TFDP), June 2005, page 14.

<sup>14</sup> CEDAW is one of the most ratified human rights conventions but discrimination against women remains a major problem especially in Asia.

<sup>15</sup> Amnesty International, AI Index AMR 51/164/2002, November 1, 2002.

<sup>16</sup> Supreme Court Rules in Case of Guantanamo Detainees. Available from: <http://www.vlsalaw.com/print3jul104>. [accessed 25 August 2005].

<sup>17</sup> "No legal rights", *Philippine Daily Inquirer*, November 3, 2002, page A13.

<sup>18</sup> Human Rights Watch. US: Court Limits President's Power over Terrorism Detainees: Rights to Judicial Review of Detentions Upheld. Available from: <http://hrw.org/english/docs/2004/06/28/usdom8969.txt.htm>. [accessed 9 August 2005].

<sup>19</sup> Human Rights Watch website. Available from: [http://www.hrw.org/doc/?t+usa\\_gimno](http://www.hrw.org/doc/?t+usa_gimno). [accessed 9 August 2005].

<sup>20</sup> Human Rights Watch, April 2005, Vol.17 No.1 (G). Available from: <http://www.hrw.org/reports/2005/us0405/us0405>. [accessed 9 August 2005].

<sup>21</sup> de Mesa and Parong (eds) *op. cit.*

<sup>22</sup> United Nations Office of the High Commissioner for Human Rights, Ratification Status as of June 3, 2005. Available from: <http://www.ohchr.org/English/bodies/docs/Ratification>. [accessed 20 August 2005].

<sup>23</sup> UN CESCR General Comment No. 4, The right to adequate housing, Art. 11.1 of the Covenant, Document E/1992/23, Sixth Session, 1991.

<sup>24</sup> Urban Development and Housing Act (UDHA) of 1992 or Republic Act 7279. This law does not apply to rural areas.

## SOURCE BOOK ON HUMAN RIGHTS

<sup>25</sup> Koen de Feyter, "Filling Our Gaps on Economic, Social and Cultural Rights, Proceedings of the Asian and International Consultations on Economic, Social and Cultural Rights" International Perspectives on ESCR, Sponsored by NCOS-Belgium, Quezon City, Philippines, November 1999.

<sup>26</sup> UNCESCR, "General Comment No. 3," The Nature of States Parties' Obligations (Art. 2, para.1, of the Covenant) in document E/1991/23, Fifth Session of 1990, paragraphs 2 and 9.

<sup>27</sup> *Ibid.*

<sup>28</sup> Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, E/CN.4/1987/17, 8 January 1987, UN Economic and Social Council, Art. 23.

<sup>29</sup> Committee on ESCR, "General Comment No. 3 on the Nature of States Parties' Obligations," paragraph 10.

<sup>30</sup> Task Force Detainees of the Philippines *et. al.*, "The Philippine State's Obligations to Its Citizens Right to Adequate Food and Right to Adequate Housing," An NGO Report Submitted to the United Nations Committee on ESCR during the 31<sup>st</sup> Session, Geneva, November 2003.

<sup>31</sup> "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights," Edited by Van Boven, Flinterman and Westendorp, SIM Special No.20, pages 24-25.

<sup>32</sup> United Nations, *Human Rights Handbook for UN Staff*.

<sup>33</sup> Committee on ESCR, General Comment No. 3.

<sup>34</sup> Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics and Morals*, Clarendon Press, Oxford, 1996, page 299.

<sup>35</sup> Task Force Detainees of the Philippines (TFDP), "Human Rights: UN Complaint Mechanisms and Special Procedures," November 2002, Quezon City, Philippines.

## References

- Amnesty International (2002) AI Index AMR 51/164/2002, November 1.
- Associated Press (AP) (2002) "No legal rights", *Philippine Daily Inquirer*, November 3.
- de Feyter, Koen (1999) International Perspectives on ESCR, Filling Our Gaps on Economic, Social and Cultural Rights, Proceedings of the Asian and International Consultations on Economic, Social and Cultural Rights, Sponsored by NCCOS-Belgium, November.
- de Mesa, Max and Aurora Parong (eds) (2005) *Blood Stains the Arroyo Government, Human Rights Under the Arroyo Government*, January-December 2004, Task Force Detainees of the Philippines, June.
- History: Human Rights Time Line. Available from: <http://dccc2.bu.edu/refugees/history>.
- Human Rights Watch (2005) "Religious humiliation of Muslim Detainees Widespread", New York, May 19. Available from: <http://hrw.org/english/docs/2005/05/19/usdom10981.txt.htm> [accessed 10 August 2005].
- Human Rights Watch (2005) Vol. 17 No. 1 (C), April. Available from: <http://www.hrw.org/reports/2005/us0405/us0405> [accessed 9 August 2005].
- Human Rights Watch website. Available from: [http://www.hrw.org/doc/?+usa\\_gltimo](http://www.hrw.org/doc/?+usa_gltimo) [accessed 20 August 2005].
- Human Rights Watch. "US Court Limits President's Power over Terrorism Detainees: Rights to Judicial Review of Detentions Upheld". Available from: <http://hrw.org/english/docs/2004/06/28/usdom8969.txt.htm> [accessed 9 August 2005].
- Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, E/CN.4/1987/17, 8 January 1987, UN Economic and Social Council, Art. 23.
- Office of the UN High Commissioner for Human Rights. *International Law: The Core International Human Rights Instruments and their Monitoring Bodies*. Available from: <http://www.ohchr.org/english/law/index.htm> [accessed 15 August 2005].

Office of the UN High Commissioner for Human Rights (2005) June 3. Available from: <http://www.ohchr.org/English/bodies/docs/Ratification> [accessed 20 August 2005].

Parong, Aurora (1998) "Democratizing Development in the Philippines and Southeast Asia", *Trocaire Development Review*, Dublin.

Robinson, Mary former UN High Commissioner for Human Rights. Available from: <http://www.unicef.org/crc/convention> [accessed 25 August 2005].

Shuman, David (1993) *Teaching Human Rights*, Denver: Center for Teaching International Relations Publications, U of Denver, pp. 6-7.

Steiner, Henry and Philip Alston (1996) *International Human Rights in Context: Law, Politics and Morals*, Oxford: Clarendon Press.

Supreme Court Rules in Case of Guantanamo Detainees. Available from: <http://www.visalaw.com/print3jul104> [accessed 25 August 2005].

Task Force Detainees of the Philippines (TFDP) (2002) *Human Rights: UN Complaint Mechanisms and Special Procedures*, November, Quezon City, Philippines

University of Minnesota Human Rights Center, Peace Resource Center, Human Rights Time Line. Available from: <http://www1.umn.edu/humanrts/peace/peaceedu/binder2.html> [accessed 25 August 2005].

UN Committee on Economic, Social and Cultural Rights. "General Comment No. 3, The Nature of States Parties Obligations, Art. 2 para. 1, of the Covenant", UN Doc. E/1991/23, Annex III in "General Comments Adopted by the Committee on Economic, Social and Cultural Rights", Thailand: Office of Human Rights Studies and Social Development and Mahidol University.

UN Committee on Economic, Social and Cultural Rights. "General Comment No. 4, The Right to Adequate Housing (Art. 11 (1) of the Covenant", Document E/1992/23, Sixth Session, 1991 in "General Comments Adopted by the Committee on Economic, Social and Cultural Rights", Thailand: Office of Human Rights Studies and Social Development and Mahidol University.

United Nations, *Human Rights Handbook for UN Staff*.

United Nations Charter.

United Nations Convention of the Rights of the Child (CRC).



United Nations Convention on the Elimination of Discrimination against Women (CEDAW).

United Nations International Covenant on Civil and Political Rights (ICCPR).

United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR).

United Nations Universal Declaration of Human Rights (UDHR).

Van Boven, Theo, Cees Flinterman and Ingrid Westendorp, "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights", SIM Special No. 20.



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#### WHAT ARE HUMAN RIGHTS?

*Carlos Medina*

In our country and around the world today, we often hear and read about human rights. They are daily invoked and daily flouted. They are paid great lip service not only by individuals but also by most, if not all, states. Officially, all governments are for human rights, including those which can be counted among its worst violators.

Despite all this talk of human rights, however, the concept remains vague and confusing. It is not too clear even to many of its adherents what the expression really means. This situation is due to a combination of factors. It may be attributed to the fact that there is much development taking place in the field of human rights. But it is also a consequence of socio-economic and political circumstances which make human rights advocacy highly controversial and hazardous, particularly in areas of conflict.

This essay will not attempt to outline these developments or discuss the political and economic causes which make human rights advocacy confusing and difficult. These important topics will have to await future treatment. At the moment, we will focus on some basic considerations. In particular, this essay will seek to define the concept of human rights in its general sense and outline its philosophical foundations.

#### Ordinary Rights and Human Rights

The idea of human rights is based on one very simple demand: that respect be shown for human dignity. But to define human rights in these terms may not be quite helpful. For our purposes, human rights can be better appreciated if we distinguish them from our other rights.

\* Reprinted from the Philippine Human Rights Monitor, Vol. III No. 1 - January 1990 and No. 2 - February 1990.



These other rights, which we shall call ordinary or legal rights, are possessed by us not because of our humanity but by virtue of some transaction which we enter into or the happening of an event.

For instance, a person's right to drive his car and to deny others its use is based on his ownership of the car as a result of his having bought it. Without a sale or other prior transaction (lease, donation, and others), he would have no right to the use of the car at all. In the same manner, the right, for instance, to demand the payment of damages from another can arise only when the other has committed an offense for which he becomes liable to pay damages.

As ordinary rights are acquired or created by some act or event, so can they be alienated or extinguished by other acts or events. A car owner can sell or donate his car, lend it to a friend, dump it in a junkyard or burn it as he pleases. Likewise, a claimant for damages may lose his right if he fails to assert it within the period provided by law.

Moreover, individuals may have these rights in different measures. A person may own a bigger and more expensive car than another. Or an accident victim who is wealthy may be entitled to bigger damages from the wrongdoer than a victim who is homeless and unemployed.

Human rights, on the other hand, are rights which all human beings have by virtue of their humanity. Unlike ordinary rights, their existence or availability does not depend on the happening of any act or event, or on the grant of any individual or government. They are inherent rights, i.e., they belong to man simply because he is a human being.

As inherent rights, human rights, unlike ordinary rights, are inalienable and imprescriptible. They cannot be sold, mortgaged, donated, forfeited or transferred by man or taken away by the state. Neither can they be lost through time by a person's failure to exercise or assert them.

Human rights are also fundamental rights. They are entitled to special protection because many other values depend on them. It does not follow, however, that all these rights are absolute. For instance, a person may be deprived of his right to life after due process of law. Like ordinary rights, reasonable limitations are permissible in the case of human rights.

Lastly, human rights are enjoyed by all human beings in the same measure regardless of sex, race, color, creed, language, political opinion, national or social origin, or status of life. While with ordinary rights it may often be legitimate to differentiate between individuals in different circumstances and for different reasons, no such discrimination is allowed with regard to human rights. All persons must be treated equally, i.e., whatever their features or characteristics may be, detained without trial, denied employment or deprived of their basic needs.

### Foundation of Human Rights

There is no "birth certificate" showing exactly when and where human rights as a demand originated. The demand for human rights, because of its universal inheritance, cannot be confined to any given time and place. Western civilization may have recognized and defined this demand and started to give it form and substance. It would be wrong, however, to say that the West invented human rights.

The concept of human rights, as it is understood today, evolved through time, and its various elements have different origins and sources. Among the important sources of modern human rights theory are religious doctrines, natural law theory, and the principles of positivism and Marxism.

While the term "human rights" may not be found in the texts of traditional religions, they nevertheless speak of ideas and values which are central to human rights: right and wrong, good and evil, justice and fairness, equal protection of the laws, and the essential dignity and equality of men.



The doctrine, for instance, that God is the father of humanity and that all men are created in His image in effect makes all men brothers before God (equality) and bestows on man a high value of worth (dignity). These qualities give rise to certain universal rights which inhere in man as a divine creation and are inalienable by him because they ultimately come from a divine source.

Modern human rights, however, is more closely associated with the theory of natural rights flowing from natural law. Natural law embodies principles of justice which are in accordance with nature and which principles are discovered by man through use of his reason alone. Under natural law, human actions are judged based on whether or not they are agreeable to the human nature of man.

Natural law principles led to the recognition of natural rights, i.e., inherent and therefore inalienable rights of man in a state of nature, particularly the rights to life, liberty and property. Natural rights theory inspired the declarations on the rights which the state cannot encroach upon, like freedom of speech and of the press, freedom of assembly, and the right to privacy.

There were those, however, who did not believe in any divinity or in a moral dimension that permeates the natural world. For these people, laws based on these beliefs were objectively unverifiable and as such did not carry much force. In their thinking, it is pointless to talk of good and bad laws; laws are valid and meaningful only to the extent that they can be enforced.

This theory, which was developed in the 19<sup>th</sup> century and is known as positivism, further assumes that there is no *a priori* source of rights as in divine law or natural law. All authority emanates from the state; the law is what the state says it is. And the source of rights can be found only in the laws promulgated and enforced by the state. Where no law provides for any particular right, such right does not exist.

Another reaction to the earlier theories came from Marxism. Marxism put the interests of society over individual interests. In rejecting the notion of individual

rights as *bourgeois* illusion, Marx believed that individual freedom can come only after society has been reformed. As against the socialist state, the individual ultimately has no rights, only duties.

Unlike the thinkers of the French and American revolutions, Marx emphasized economic advancement over civil and political rights. This led to the formulation of social and economic rights the guarantee of which required active state intervention, like the rights to work, to a just wage, to food and shelter, to education and to health.

All the above theories were eventually synthesized in the 20<sup>th</sup> century formulation of human rights. The natural rights of men were converted into positive legal rights as embodied in national constitutions and international human rights instruments. The gap between emphasis on individual liberty and on the welfare of society was bridged by acceptance of the indivisibility of civil, political, social and economic rights. And in the protection of these rights, the government's role came to be viewed as both passive and active, i.e., government must not unduly interfere in the exercise of civil and political rights, but must take an activist position when it concerns the promotion of social and economic rights.

### References

- Henkin, L. (1978) *The Rights of Man Today*.
- Marie, Jean-Bernard (1985) *Human Rights or a Way of Life in a Democracy*.
- Meron, T. (1984) *Human Rights in International Law: Legal and Policy Issues*.
- Sieghard, P. (1983) *The International Law of Human Rights*.





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## HUMAN RIGHTS - INTERNATIONAL AND DOMESTIC STANDARDS

### Introduction

Peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women, and have determined to promote social progress and better standards of life in larger freedoms (Universal Declaration of Human Rights, Preamble, 1948).

To be sure, the notion that human beings are imbued with inherent and inalienable rights is not new. But the principle that such rights are to be enjoyed by everyone without any form of discrimination, that governments/states are singly and/or collectively responsible to ensure respect for and protection of such rights and, more importantly, that governments are accountable to a system of compliance monitoring – that is revolutionary.

The logical consequence of these is the acceptance of the centrality of the individual in every human endeavor. Another important consequence is for states/governments to accept, at least in principle, that it is their legal duty and responsibility to respect, protect and fulfill human rights within their jurisdiction. Failure of governments to do so could result in legitimate international scrutiny and intervention.

### Human Rights

*Human Rights Defined.* The United Nations defines human rights as those rights that are inherent in our nature and without which we cannot live as human beings. Human rights and fundamental freedoms allow us to develop and use our qualities, our intelligence, our talents and our conscience, and to satisfy our spiritual and other needs. They are based on mankind's increasing demand for a life in which the inherent dignity and worth of each human being receive respect and protection. For its part, the Commission on Human Rights of the

Philippines defines human rights as the supreme, inherent, and inalienable right to life, to dignity, and to self-development. These are the rights that in essence define man and woman as human beings.

Human rights are concerned with issues in the spheres of civil and political rights and economic, on one hand, and social and cultural rights, on the other. Both are founded on internationally accepted human rights obligations, to which the Philippines is a State Party.

*Civil Rights* are those rights that the law will enforce at the instance of private individuals for the purpose of securing to them the enjoyment of their means to happiness. Civil rights partake of the nature of political rights when these are utilized as a means to participate in government.

*Political Rights* are those rights that enable us to participate, directly or indirectly, in running the affairs of the government.

*Economic and Social Rights* are those rights that the law confers upon people to enable them to achieve social and economic development, thereby ensuring their well-being, happiness and financial security.

*Cultural Rights* are those rights that ensure the well-being of the individual and that foster the preservation, enrichment, and dynamic evolution of national culture based on the principle of unity in diversity and under a climate of free artistic and intellectual expression.

#### Examples:

Civil and Political Rights	Economic, Social & Cultural Rights
Right to life, liberty, and security of person, Prohibition of slavery, Prohibition against torture, and of cruel, inhuman, or degrading treatment, Right to equal protection, Right to legal recourse, Right not to be subjected to arbitrary arrest, detention or exile, Right to a fair trial in both civil and criminal matters, Presumption of innocence and the prohibition against the application of ex post facto law, Right to privacy and freedom from attacks on honor, Right of everyone to leave any country, including his own, and to return to his country, Right to seek asylum in other countries from persecution, Right to a nationality, Freedom of religion, Freedom of thought and expression, Freedom of assembly, Right to take part in the government of one's country, directly or indirectly or through freely-chosen representatives	Right to work, Right to education, Right to health, Right to adequate food, Right to marry whomever he/she chooses, Right to adequate shelter and services, Right to own property, Right to social security, Choice of employment and labour unions, limited work hours, Right to social and international order, Right to culture, Right to clean environment, Right to development

#### Characteristics of Human Rights and State Obligations

All human rights are universal, indivisible, interdependent and inter-related. The international community must treat human rights everywhere in a fair and equal manner, on the same footing, and with the same importance or emphasis. While the significance of national and regional particularities and of various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

By reason of a State's ratification of or accession to human rights conventions, it unconditionally accepts the international human rights legal system. In so doing, the State is committed to take the necessary steps to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in each of the treaties. In the case of economic, social and cultural rights, the State Party is under obligation to take all appropriate means, individually through the adoption of legislative measures and collectively through international assistance and co-operation (and to the extent allowed by its available resources), to progressively achieve the full realization of the rights recognized in the Covenant.

These State obligations are to:

1. Respect and ensure the recognized rights of everyone, without distinction of any kind.
2. Refrain from violating those rights or restricting/ interfering with the exercise of the rights other than as permitted by the Covenant.
3. Ensure rights and freedoms by removing obstacles to, and creating the conditions necessary for, their enjoyment.
4. Ensure the equal right of men and women to the enjoyment of rights.
5. Adopt necessary legislative or other measures necessary to give effect to covenant rights.

6. Specifically prohibit, with criminal sanctions, violation of some rights, including the right to life, the right not to be tortured or subjected to slavery or servitude, as well as rights against gender-based violence.
7. Bring into conformity with human rights treaties legislation such as those relating to arrest, detention and trial, electoral laws and family law, which are relevant to the enjoyment of rights.
8. Strictly apply limitations on these rights and freedoms, i.e. as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedom of others.
9. Adopt other measures of a non-legislative kind which are necessary to make rights effective and to remove obstacles to their enjoyment – such as right to legal assistance, preferential treatment, or other positive action to overcome discrimination or to bring a disadvantaged group to a position equal to that of the rest of the population.
10. Ensure that any person whose rights or freedoms are violated shall have an effective and enforceable remedy even against persons acting in an official capacity.
11. Ensure that any person claiming such remedy shall have his/her right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority, and to develop the possibilities of judicial remedy.
12. Enforce, through competent authority (judicial, administrative, legislative, etc.), such remedies when and as they are granted. Essential requirements of these remedies are that they must be effective, they must end violation, they must overcome or compensate for their (violations') effects, and they must ensure against further violations.

13. Provide all other effective legal remedies and legal protection in respect of each recognized right and freedom.
14. Inform all the people about their rights by publishing the treaties and relevant information in local languages.

These State Obligations may also be considered at the level of state responsibilities, as follows:

Obligation to RESPECT - requires the state, and thereby all its organs and agents, to ABSTAIN from doing anything that violates the integrity of the individual or infringes on his/her freedom.	Obligation to PROTECT - requires the state and its agents to take measures necessary to PREVENT other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual.	Obligation to FULFILL - requires the state to take the measures necessary to ENSURE for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognized in the human rights instruments, which cannot be secured by personal efforts.
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State Obligations may be further distinguished as follows:

Obligation of CONDUCT - is the behavior which the duty-holder should follow or abstain from.	Obligation of RESULT - is less concerned with the choice of the line of action taken but more with the results which the duty-holder should achieve or avoid
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**The Principle of State Complicity.** State responsibility extends to the action of its agents or functionaries, including those related to "private" violations of human rights. The State is deemed an accomplice in the violation when there is systematic deprivation of human rights amounting to official State acts. Examples of State acts that may be tantamount to complicity are:

- Failure to prevent crimes of violence against men, women, and/or children, by not enacting the appropriate legislation, by not providing appropriate legislation, by not providing for effective law enforcement, or by not undertaking gender sensitivity or public awareness programs;
- Failure to provide for effective relief or remedy to victims of violence (e.g., by State



inaction in the face of an insensitive judiciary);

- A prohibitively expensive legal system;
- Lack of awareness of men, women, and/or children of their rights, and lack of available remedies when those rights are violated; and
- Failure to provide support services, e.g. counseling, shelter to victims of human rights violations.

In summary, according to the Vienna Declaration and Programme of Action, "There is a need for States and international organizations, in cooperation with non-governmental organizations, to create favourable conditions at the national, regional and international levels to ensure the full and effective enjoyment of human rights. States should eliminate all violations of human rights and the causes as well as obstacles to the enjoyment of these rights."

### The Philippines and its Obligations under Human Rights Law

The role of the Philippine Government in the realization of human rights is very essential. It is, after all, created by the people to ensure the protection and full enjoyment of their human rights. Based on this sovereign act of the Filipino people under the Constitution, the Philippines has ratified or signed, with a few exceptions, all major human rights treaties.<sup>1</sup> The status of these international human rights treaties ratified by the Philippine Government follows the Doctrine of Incorporation. According to Sec. 2, Article II of the 1987 Philippine Constitution, "The Philippines renounces war as an instrument of national policy and adopts the generally accepted principles of international law as part of the law of the land, and adheres to the policy of peace, equality, justice, freedom and cooperation and amity with all nations" (emphasis supplied).

The Philippine Constitution goes beyond the statement of principles by incorporating Article XIII,

entitled "Human Rights and Social Justice", which states that "The Congress shall give highest priority to the enactment of measures that protect and enhance the rights of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good." The basis of all human rights-related provisions of the Constitution is the expressed fundamental principle of the State policy that "The State values the dignity of every human person and guarantees full respect for human rights." Likewise, the Constitution provides that "The State shall promote social justice in all phases of national development."

The Philippine Government's system of checks and balances ensures the realization of human rights. Congress fleshes out the constitutional guarantees on human rights by enacting laws. These laws are enforced through the powers of the executive branch. For its part, the judiciary, in the exercise of its power of judicial review, may declare a law unconstitutional if it contravenes the provisions of the Constitution.

At the same time, the Philippine Constitution created independent institutions to function as watchdogs of the three branches of government. These are the Commission on Human Rights, Commission on Audit, Civil Service Commission, Commission on Elections, and the Office of the Ombudsman.

### Emerging Issues

Human rights activists, especially those based in the Philippines, have encountered extra-judicial questions important to their advocacy pursuits. Although varied, their concerns may be summarized as follows:

1. Sovereignty question: The enforceability of internationally protected human rights.
2. Human individuals as subjects of international law.
3. International tribunals with jurisdiction over crimes against humanity (genocide).

4. Expanded scope of public law over traditionally private law (i.e. domestic violence, systematic rape, reproductive rights, children's rights).
5. Territoriality principle in criminal law re-visited. Some countries have passed legislation granting national courts jurisdiction over crimes (e.g. pedophilia) committed by nationals abroad. Rules of evidence revisited.
6. Applicability of the principle of *stare decisis* on jurisprudence developed in the UN Human Rights treaty-monitoring bodies and international tribunals.
7. The International Criminal Court: Problems and Prospects.
8. Are human rights treaties ratified by the Philippines automatically enforceable in Philippine courts? How and by what means?
9. Issues concerning the role of judges in "humanizing the law". Judicial activism revisited.
10. The five pillars of the justice system – emerging efforts to strengthen networks for the promotion and protection of human rights, especially children's and women's rights.

The idea that human rights should be enjoyed by every human being goes back to man's beginnings. But the protection and promotion under international law of those human rights is still in its infancy compared to the system of government. It is thus the intention of the international legal and human rights systems to narrow the existing gap between human rights aspirations and reality and, thus, to ensure that each human being is accorded the dignity he is entitled to.

## Endnotes

<sup>1</sup> UN Charter, Universal Declaration of Human Rights, International Covenant of Economic, Social and Cultural Rights, International Covenant of Civil and Political Rights, Optional Protocol to the International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Discrimination, International Convention on the Suppression and Punishment of the Crime of Apartheid, International Convention against Apartheid in Sports, Convention on the Prevention and Punishment of the Crime of Genocide, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Convention on the Rights of the Child, Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, Slavery Convention of 1926, as amended, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Convention Against the Traffic in Persons and the Exploitation of the Prostitution of Others, Convention Relating to the Status of Refugees and Protocol Relating to the Status of Refugees, Convention on the Rights of Migrant Workers and the Members of their Families, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Political Rights of Women, Convention on the Nationality of Married Women, Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Beijing Declaration and Platform of Action (1995), Nairobi Forward Looking Strategies for the Advancement of Women (1985), Report of the Mexico World Conference of the International Women's Year (1975) and Declaration of Mexico on the Equality of Women (1975).





## STATE OBLIGATIONS ON HUMAN RIGHTS\*

Maria Socorro I. Diokno

### Obligations of Conduct and of Result

State obligations are essentially twofold: states must respect human rights limitations and constraints on their scope of action and, at the same time, states are obliged to be active in their role as protector and provider. These are often referred to as state obligations of conduct and result.

### Obligation to Respect

The obligation to respect human rights requires the state to abstain from doing anything that violates the integrity of the individual or infringes on the individual's freedom. The respect-bound obligation forbids the state to act in any way that directly encroaches upon recognized rights and freedoms. It is, in essence, a prohibition against state interference. Although it appears that respect-bound obligations are negative in character, these obligations carry with them positive aspects. While the obligation to respect human rights requires states to desist from restricting human rights, at the same time, they demand that the state accept the corresponding duty to create and facilitate an economic, social and political environment conducive to the enjoyment, exercise and realization of human rights. For example, under no circumstances may states engage in torture; but at the same time, states must take measures to ensure that torture does not occur in their jurisdiction. Such measures could include, among others, information campaigns, bringing torturers to justice, etc.

The obligation to respect human rights is immediate. The respect-bound obligation is unconditional, meaning states must not destroy people's livelihood, people's personal security or health, people's homes, people's cultural identity, etc.<sup>1</sup> For example, states must respect the right to food by not taking any measures that result in preventing access to food.

### Obligation to Protect

The obligation to protect human rights compels the state to take steps to prohibit others from violating recognized rights and freedoms. The protection-bound obligation binds the state from taking any measures that would erode the legal and practical status of human rights, and imposes upon states the duty to act to preclude further deprivation. The protection-bound obligation places sufficient legal and policy emphasis on the full realization of human rights through a series of active measures, including the guarantee of access to legal remedies for any infringement caused by a third party. The protection-bound obligation requires states to prevent violations of human rights by third parties, meaning states must not connive with any third party which destroys people's livelihood, people's personal security or health, people's homes, people's cultural identity, etc.<sup>2</sup>

For example, states must protect the right to health, by ensuring that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct.

### Obligation to Fulfill

The obligation to fulfill has two dimensions: *obligation to fulfill (facilitate or promote)* and *obligation to fulfill (provide)*. The United Nations Committee on Economic, Social and Cultural Rights has noted that this obligation is not one that merely provides, but one that fulfills, so that the state is called upon as the ultimate provider of productive resources and, if necessary, goods and services.<sup>3</sup>

\* Reprinted from *Human Rights-Centered Development: Theory and Practice*, University of the Philippines Press, Quezon City, 2005.



The obligation to fulfill (facilitate or promote) human rights require the state to actively create conditions aimed at achieving full realization of human rights. The obligation also requires the state to take necessary measures to ensure that each individual has the opportunity to obtain the entitlements of human rights that cannot be secured by personal or individual efforts alone. The obligation to fulfill human rights has been characterized as the "most interventionary obligation" and as a "programme obligation". It implies a long-term view that requires financial inputs which cannot be accomplished by individuals, and that involves issues of public expenditures, state regulation of the economy, basic services, taxation, and related re-distributive measures.

The fulfillment-bound obligation requires more from states than mere legislation; it requires states to take measures that actually promote the realization of human rights. It also requires states to take appropriate legislative, administrative, budgetary, judiciary and other measures towards the full realization of human rights.<sup>4</sup> For example, states must fulfill (facilitate or promote) the right to education, by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and is of good quality for all.

When individuals or groups are unable to realize their rights by the means at their disposal, for reasons beyond their control, the state has the obligation to fulfill (provide) the right in question. For example, the state has the obligation to fulfill (provide) housing where evictions result in individuals being rendered homeless or vulnerable to violations of other rights.

### **Obligation to Take Steps**

The obligation to take steps is not qualified or limited by other considerations. While the full realization of the relevant rights may be achieved progressively, steps towards the goal must be taken within a reasonably short time after the Covenant's entry into force. Such steps

should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.<sup>5</sup> The means to satisfy the obligation to take steps include, among others, the adoption of legislative measures, provision of judicial measures, administrative, financial, educational and social measures.<sup>6</sup> The United Nations Committee on Economic, Social and Cultural Rights stresses that "the undertaking to take steps...by all appropriate means...neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected" and "reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems..."<sup>7</sup>

### **By All Appropriate Means**

All appropriate means are not limited to the adoption of legislative measures; they include, among others, provision of judicial remedies, administrative, financial, educational, budgetary, social and other measures. It is important to note that legislation, if not enforced, will not per se prove that the state is complying with this obligation by all appropriate means.

### **To the Maximum of its Available Resources**

Available resources include, among others, physical factors, natural resources, human power, existing productive capacities, financial resources in domestic currency and foreign exchange, receipts from borrowings, grants, and assistance programs that are available for state use. This obligation requires all states to make maximum use of available resources to ensure the widest possible enjoyment of human rights. This obligation remains, even where available resources are demonstrably inadequate. The obligation includes the adoption of relatively low-cost targeted programs designed to affect the most vulnerable and marginalized, even in times of severe resources constraints.

The United Nations Committee on Economic, Social and Cultural Rights stresses:

*In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must be demonstrated that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.*

For example, for 2002, of its total available financial resources, the Philippine government intends to spend P 7 Billion for the realization of the right to food. This represents only nine (9) percent of the total budget, or P 901.87 (US \$17.49) per Filipino for the entire year. The government intends to spend P 22 Billion to realize the right to health; this amount represents only three (3) percent of the total budget. Government intends to spend P7.4 Billion to realize the right to housing. This figure represents only one (1) percent of the total budget; in per capita terms, this figure translates to less than P100 (US\$ 1.86) per Filipino for the entire year. Clearly, there are financial resources available to government, but government has chosen to spend its available financial resources on items other than the progressive realization of fundamental economic, social and cultural rights. Because it is the Philippine Government that established its priorities and crafted its budget, it is ultimately responsible for being both unable – and unwilling – to comply with its fundamental obligations to respect, protect and fulfill the rights to food, health, housing, social security and work of the Filipino people.<sup>8</sup>

### Towards Achieving Progressively the Realization of Human Rights

The United Nations Committee on Economic, Social and Cultural Rights also defined the meaning of “progressive realization.”

*The concept of progressive realization constitutes a recognition of the fact that full realization of all economic,*

*social and cultural rights will generally not be able to be achieved in a short period of time.... Nevertheless, the fact that realization over time, or in other words progressively, as foreseen under the Covenant, should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards the goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.<sup>9</sup>*

### Non-Compliance with State Obligations

In determining whether the State complies with its obligations or not, it is important to distinguish the *inability from the unwillingness* of a state to comply with its treaty obligations. A state claiming that it is unable to carry out its obligations for reasons beyond its control has the burden of proving that this is the case.<sup>10</sup> A state not capable of proving inability due to forces reasonably beyond its control would be in violation of human rights.<sup>11</sup>

### Endnotes

<sup>1</sup> Paragraph 6, Part II, “The Maastricht Guidelines on Violations of Economics, Social and Cultural rights.” The Maastricht Guidelines; Kunnenmann, “Violations for the Right to Food,” The Maastricht Guidelines, p. 170.

<sup>2</sup> *Ibid.*

<sup>3</sup> Kunnenmann, “Violations of the Right to Food,” The Maastricht Guidelines, p. 171.

<sup>4</sup> Paragraph 6, Part II, “The Maastricht Guidelines on Violations of



Economic, Social and Cultural Rights," The Maastricht Guidelines.

<sup>3</sup> General Comments No.3, paragraphs 1 and 2.

<sup>4</sup> *Ibid*, paragraphs 3 to 7.

<sup>7</sup> *Ibid*, paragraph 8.

<sup>8</sup> Maria Socorro I. Diokno, "ESC Rights and Budget Analysis", paper presented before the Seminar Workshop: Developing Strategies to Monitor and Advance Economic, Social and Cultural Rights in the Asia Pacific Region, jointly organized by Forum Asia and Task Force Detainees of the Philippines, held at the Davao Waterfront Insular Hotel, Davao City, on October 24, 2001.

<sup>9</sup> *Ibid*, paragraph 9.

<sup>10</sup> Paragraph 13, Part II, Maastricht Guidelines.

<sup>11</sup> Victor Dankwa, Cees Flinterman and Scott Leckie, "Commentary on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights," The Maastricht Guidelines, p. 25.



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## CHAPTER 2 Historical and Philosophical Foundations

### THE RIGHTS OF THE HUMAN\*

Tom Danenberg

My point of view is philosophy. I am convinced that this point of view is essential to the work of the Commission. But let me clarify: philosophy, as I see it, is not there to tell us what human rights are. Human rights are not the fruit of philosophical ideas. Philosophy comes in only as a reflection, a second thought. Human rights, as rights, are born out of the concrete struggle of people. They are not the making of philosophers, or lawyers, or commissions or of parliaments. Human rights are born out of pain and conflict. They are the fruit of life.

Why I am saying this? Modern times, i.e., the period since the 17<sup>th</sup> century, no longer allow people to rely on metaphysics or on a divine order, as in the Middle Ages. Even the idea of human nature does not offer a real basis, if we speak of human rights. "Human nature" as an idea hardly has a clear content. Various philosophies give various definitions.

The idea of human rights is appealing to everyone, whatever culture or religion one belongs to. But the risk is, as Claude Lefort says, that the idea of human rights is just used to mobilize and convert collective energy into a force that can measure up with other forces. Everyone speaks of human rights, but each for his or for her own interest. Human rights is a sensitive issue, and can be manipulated by any party for its own sake. Maybe even you in the Commission feel this dilemma. As a

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Commission, what do we stand for, you may ask: on the side of the government, meaning the administration; on the side of the establishment; on the side of the NGOs; on the side of the non-articulated demands of ordinary people; or on the side of the Law?

So, what is human rights about if not about some definite concepts? To answer this question, a brief historical reflection, which will contrast this reflection with totalitarianism, which has played such a big role in the 20<sup>th</sup> century and which we ourselves have experienced during the Marcos years, will be presented. This will lead to some final conclusions on the relation between human rights and politics, and in particular, on the place of the Commission on Human Rights in political society.

### Human Rights: A Historic Event

In every culture and religion, there has always been a special sense for the dignity of the human person and some form of respect for the stranger or other individuals without rights. But for centuries, these rights of people were mostly contained in traditional codes and customs, and based in the social organization of a particular society. Everyone had rights according to his or her place in one's particular society. For example, knights, priests and servants were the main estates in medieval feudal society, where a social feud or covenant defined each one's rights according to the estate where one belonged. Rights were, in fact, not defined as 'human' rights but as rights of the estate.

What then was the reason for the French in 1789 to declare and formulate officially the "Rights of Man and of the Citizen", which is considered the first declaration of human rights? Or what reasons did the American colonists have to invoke in their Declaration of Independence the Rights of Man as the foundation of state and government? To understand that, we have to go back to the context of the time.

From the 16<sup>th</sup> to the 18<sup>th</sup> century, France, like other countries, developed as a Nation State and as a strong economic and military power. At the same time, national

unity was being built up under the rule of the Monarch. The centralization of power in this Nation State, i.e. the empowerment of the monarchy and of its bureaucracy, had meanwhile undermined the traditional powers of the landed nobility and dissolved much of the social structures that had traditionally held society together. All power was concentrated in the palace at Versailles. Therefore, when the French Revolution beheaded the King, it actually beheaded the center of power. It left a power vacuum. We have to see this event in context if we are to understand the Declaration of the Rights of Man and of the Citizen. The Rights of Man was a political act of unprecedented importance. It was a replacement of the old order by a new political order. The center of power was replaced by an empty space and the Declaration of the Rights of Man was an attempt to fill that vacuum.

It is interesting to see how this shift is reflected in the symbolic order. Claude Lefort, a French political thinker, suggests that each society has an image when it speaks or thinks about itself. A good example is the medieval image of society as a body. Lefort refers to studies on medieval politics. In the body, each organ has a natural place. Together, the different organs form a unity, a single organism. As St. Paul, for instance, applied the image: the arm should not say to the leg, "let me do your job." Society is perceived as an organic unity where each class of people has its own natural place. The image plays a dominant role in the time of the absolute monarchies of the 17<sup>th</sup> and 18<sup>th</sup> centuries as well. The King is the head but, as head, the King is at the same time the representative of a higher order. He is the representative of Christ, and Christ represents God the Father Almighty. During the same period, however, philosophers start to propose a radical shift in imagery. This shift lays the foundations for the modern concept of society that took shape during the American and the French revolutions. They speak of society in the image of a social contract. A contract is an agreement between independent and equal parties. The image of the organic



unity is replaced by that of conflicting parties who negotiate with one another. The unity of society is a negotiated arrangement of various interests. The rules are not given by the natural place and order of each organ but by mutual agreed settlement.

This explains where the French and also the American declarations originated, and how these documents set the ground rules for the social contract to hold society together. These declarations, however, have had a revolutionary impact, as revolutionary as the shift in world view that happened through the new concepts of science which were introduced by Galileo Galilee. But as in the case of modern science, this impact could only be seen much later. The history of Europe from the 19<sup>th</sup> and 20<sup>th</sup> centuries up to this day, and I guess even the respective histories of our countries, have been and still are ongoing struggles to deal with that event.

Under the Ancien Régime, the Monarch symbolized and was, in effect, the center of power and law. Any opinion about society was ultimately subjected to the King's final judgment. The King was the embodiment of power, law and judgment, and knowledge. When the King was beheaded and the center of power became an empty space, the Rights of the Human took that place. But how could that happen? First, it meant the disentanglement of Power, Law and Knowledge. There is in the first place a Law, the Constitution, which says and regulates who takes the place of power and for how long. No one can claim power except by law. No power can further indiscriminately impose its own law. And finally, laws are constantly under scrutiny. There is freedom of public discussion and of assembly through which existing laws and practices in society can be questioned.

How does the Declaration of the Rights of Man come into the picture? This Declaration does not simply define the rights of individual citizens. It replaced the traditional corporate concept of society and it in fact changed the basic construct of society. What kept society together was not anymore the center of power that functioned as head

of a body. What for centuries had counted as center of power was replaced by a space for public discussion. And in that open space a variety of interests, ideas, values, etc., are circulating. The idea of human rights enters into this open space, but the human as basis of unity is not something definite, and its rights are not laid down in any definite form.

But from the beginning there have also been strong reactions against this revolution. Representatives of the traditional estates expressed their skepticism. One of them said: I know French, Italians, Russians, but I do not know "man". In other words, he said, you cannot define a human being without his or her concrete social context. Man as man is an abstraction. Another skeptical or rather cynical reaction came from Karl Marx. He said in one of his early writings that the rights of man are an illusory idea; they are in reality the rights of the bourgeoisie. Because what one's rights are is defined by one's social position, and one's social position is defined by one's place in the market. When you are a capitalist, you have capital as power to negotiate; when you are a worker, you have only your labor power.

### Human Rights and Totalitarianism

Two centuries have passed since the American and French Revolutions, and these have been a very dramatic period. The industrial revolution and the global colonial and imperialist intrusion of Western capitalism have changed the face of the earth. Revolutions, like the Russian and the Chinese, have not only deeply affected the fate of entire peoples, they have awakened dreams in millions. Totalitarian fascist and communists regimes have created reigns of terror.

All these seem to confront us with a contrasting image of reality. What real space is there in the modern world for human rights? Does power really allow for Law to set rules? Is LAW anything more than the imposition by the powerful of their will through other means? How "free" is politics *vis-à-vis* economic necessity? These questions haunt us. On the other hand,

a deeper analysis of totalitarian regimes will demonstrate the significance of this rule of human rights, however vulnerable it may seem to be.

I do not wish to entertain discussion on fascist and national-socialist totalitarianism. But I want to discuss with you the problematic of Marxist totalitarianism, especially in relation to human rights. The dramatic and tragic debacle of the communist regimes needs a deeper radical analysis. These regimes were not only the effect of an ideology that originated in the dialectics of history and in social contradictions, they were also the response to the cries of millions of people who were hungry for justice.

In the beginning of the 20<sup>th</sup> century, this hope was nourished by the success of the Russian Revolution in 1917. The same thing happened in Latin America in the Sixties with the Cuban Revolution of Fidel Castro. During the First Quarter Storm of the 1970s in the Philippines, we witnessed the unselfish and persistent engagement of thousands of young people in pursuit of a dream of a radical society.

What then went wrong with these revolutions that many of them ended up establishing totalitarian regimes? This did not happen because of the mistakes of leaders, though terrible things had happened because of that too. This turn of events can neither be blamed on reformism, as some leaders would insist, among them, for example, the "Re-affirm" sector in the Communist Party of the Philippines today. The real cause comes from the very principles of these revolutions, which go back to Karl Marx, although he never intended them to turn out this way.

The principle of one-party rule has been the source of totalitarianism. Why? Looking deeper into this question will help us understand what is at stake in human rights. Marx considered rights an invention of the bourgeoisie. He saw very clearly that bourgeois society was being dissolved into a mere collection of individuals. What was binding society was the hard struggle of competition, which was heightened by the

industrial revolution. Customs, traditions and associations (like guilds, fraternities, estates, cooperatives), which had been the binding factor in the past, were falling apart. "*All that is solid melts into air*," Marx wrote famously in the Communist Manifesto.<sup>1</sup> The unity of society was dissolved. People met as individuals, and the space where they met, Marx observed, was the open space of the market. And who sets the rules there? Who sets the terms of the contract? It is the rule of capital. For Marx, therefore, all rules, agreements, laws, even concepts of what is good and evil, go back to the dictates of the ones in control. Hence, it is a bourgeois illusion, an ideological imagination, to take law as a distinct principle of social order. The only real thing, to him, is the hard struggle. Even the so-called human rights are not 'human'; they are the rights that are defined by the bourgeoisie.

On the other hand, Marx applies a dialectical argument: when the proletariat is able to set the rules and occupy the position of power, the proletariat as a class shall create a new community, where the rule of labor, not the rule of capital, will prevail. One should note that the word proletariat derives from the Latin word *proles*. The proletariat in ancient society were those who were too poor to serve the state by holding property, and who served it instead by producing children (*proles*, offspring) as labor power.<sup>2</sup> They are those who have nothing but their bodies. According to the rule of labor, however, everyone will work according to one's capacity, and benefit according to one's works, or needs. This is not the place to analyze this projection, especially in regard of what needs are. Neither shall we discuss how this rule of labor has become, in communist countries, the rule of the Marxist party and of its bureaucracy. What interests us here is how this Party rule has affected 'human rights'.

Marxist revolutions, as we know them, have claimed to establish the rule of the proletariat via the rule of the Party. That became the principle. The Party has been defined as the only legitimate representative of the



proletariat, the bearer and protector of the Revolution. But this also meant that the Party itself could not be questioned from the outside. No space was left outside the Party to control its power. Everyone who questioned the Party was considered an enemy of the Revolution. The rule of law had no ground to stand on outside the realm of power. This resulted in regimes where the Party became pervasive in all layers of society, even in the personal lives of individuals.

Marx saw very clearly the dissolution of society into a sum of individual interests. But he identified this with the industrial revolution and with the rise of capitalism. As far as he saw it, economy being the base of everything, there was no consideration for other factors. What Marx did not observe was that the dissolution of society was a process that had been going on for a much longer time, especially during the formation of the Nation States and the establishment of the absolute monarchs.

This brings us back to what I said in the first part of this paper. During the American and the French Revolutions, the issue was the principle of monarchy versus the principle of the rights of man. The beheading of the King created a vacuum not only because the person of the king was removed, but also because of the fact that the social body of king was dissolved. The declaration of human rights at that time meant that there was no divine power or delegation by the king, but that Man as Man was the ultimate reference of power and law. The dividing line between what is good and not good, just and not just, is within the human person himself/herself.

But what does this mean? Conservative and reactionary authors of the time, including the Pope, were saying: How can man as man be the judge of what is good or evil? The position of Marx was essentially the same. But if we read the texts of those Declarations more carefully, we may see the term "Man" in a different light. Not the concept 'man,' but "Man" as the ultimate point of reference. What that means becomes clearer if we take as example Art. VII of the Declaration, that "no man

should be accused, arrested, or held in confinement, except in cases determined by the law, and according to the forms which it has prescribed." First of all, it means that any power that uses force is bound by law. And the definition of such laws depends on an authority different from the one which controls the police force. Power, in other words, has to legitimize itself. But more than that, the article implies that man as man sets the law. "No man should be arrested, etc." Man as man has a dignity that no power can violate. No authority can intrude into that dignity, *'except in cases determined by law.'*

The debate on the question, "What is man?" has been going on in modern political philosophy. But the issue of human rights is not based on a theoretical or philosophical definition of "human nature." It is true that philosophers, scientists, religious traditions and religious leaders have played an important role in the definition of human nature, and this has served as a basis of human rights. However, what we call "human rights" is not an issue of theory. The revolutionary shift in political thinking since the Enlightenment and in the formation of modern states is the fact that the human as human is setting the law: the human as human, which means, not influence, position or power but the humanness of man in his nakedness. After all, human rights are not a question of agreements, covenants, declarations, and laws. These are mere instruments, rhetoric. Real human rights are rooted in and borne out of the struggle itself. Human rights are struggled for by the action of groups in courtrooms, factories and parliaments, in mass demonstrations and in the mass media.

Human rights is not a concept conceived in the mind, but one arising from the depths of people whose "rights", even though not yet articulated, are being hurt. Human rights are the witness of woundedness and frustration, self-awareness and self-assertion, anger and pain. Human rights is an issue that is born out of protest, when people become witness to their humanness, and resist the forces that are downgrading or crushing this

humanness. Human rights, therefore, are concrete rights, to be claimed in concrete circumstances. The definition of what is a "human right" is itself a subject of struggle and debate.

It has become the political rule in modern democratic society that the human as "human" is law. Human demands, as "human" demands, are not just mine, not just the imposition of my own needs, but are rights by themselves, a law that is there by the fact that I am human. When Rosa Parks refused to give her seat in the bus away to a white man in Montgomery, Alabama (USA) in 1955, she was that night not just tired from work. She said in her autobiography: "No, I was not tired physically, or no more tired than I usually was at the end of a working day...I was tired of giving in."

The Jewish tradition says that hunger, which may be a biological drive in man as biological being, becomes a divine command when it is the hunger of the other. To use a phrase of Emmanuel Levinas, a Jewish philosopher of today: "The rights of Man are the rights of the Other." Some may recall the famous text of Matthew, Chapter 25. The last judgment by Christ when he returns is not a myth regarding the so-called end of the world. The judgment is here and now. "What you have done to one of the least of my brothers - the one who is hungry, who is thirsty, who is a stranger - you have done to me," says the Judge.

A democratic society is an open space, where many debates are going on and can continue to go on. Human rights precisely means that the social space is defined by the fact that Power, Law and Opinion or Dispute are deemed to be independent, though not separated. Karl Marx was skeptical about this. Our friends in the Left today are still saying the same thing. Yet they have been the primary movers of human rights movement since the Martial Law years; they were the movers because they stood on the side of the victims. This is the paradox. There has always been a tension within Marxism, between its Messianic moment of hearing the cry of the poor, seeing their misery and heeding their plea (to cite

the words of God in the Book of Exodus), and its ideological frame. The insistence on human rights in so-called democratic societies is more than a bourgeois ploy. It places us in the open space, where we are confronted with our fragility, with the need to be alert, with the demand to face the struggle that has no end.

### Asian Controversies

But Marx and 19<sup>th</sup> century conservatives have not been the only skeptics. Recently it has become a trend, in South East Asia in particular, to relativize human rights from another perspective. The recent conflict between Indonesia and the Philippines regarding East Timor, the "lessons" given by the Prime Minister of Malaysia and Singapore during their recent respective visits to Manila, are indicative. "Low intensity democracy" and the so-called "excessive" democratic demands are slogans that have become more and more fashionable. For some authors it is simply a question of "real-politik," for others a quasi-nationalistic self-assertion. Many argue against the principle of human rights itself. Human rights is a Western concept, they claim.

This last point needs a more careful and critical reflection. Human rights as an ethical demand of respect for human dignity has deep roots in all major religious traditions. This is not a Western concept. There are, however, many concrete versions of human rights in all cultures. When it comes to basic human values, religions and cultural traditions have even been a source of resistance against the intrusion of Western consumerism and individualism.

The Western human rights tradition took shape within the context of the rise of industrial capitalism and the colonial expansionism of Western empires in the 19<sup>th</sup> and 20<sup>th</sup> centuries. But when Asian regimes today claim their own cultural heritage, they do not do so for the sake of the human. Their concern is the possible resistance that is provoked by human rights advocates against their political and economic interests and ambitions.



Instead of deepening and strengthening their own traditions to protect the people and the natural resources of the country against the destructive impact of modernization and industrialization, these traditions are only invoked to make people more subservient. "Human Rights" has been defined as "the right to have rights" (Hannah Arendt). The core of it is the right to speak, to assemble, to protect, to debate, to discuss. It is precisely that which makes human rights suspect; their so-called Western origin becomes an easy scapegoat.

### The Philippines after 1986

In 1986, when Philippine society had freed itself from the Marcos dictatorship, it intended to install a system that would prevent the recurrence of that bitter experience. Among other measures, a Commission was formed to prepare a Constitution, i.e., to formulate a basic law to govern the nation as a political society. One of the decisions of this Commission was that there would be a permanent body to watch "human rights." This is the origin of the Commission on Human Rights (CHR).

How do we look at this from the perspective of the earlier reflections in this talk? The Commission itself installed a certain order in society: a "law" as a rule to refer to. In terms of a long philosophical tradition, this "law" can be called the rule of "good" government.

On the other hand, it may be noted that such rule by itself, according to the same tradition, is not the last word. There are certain key words in political parlance which cannot be defined by law alone. What "is" society or safety? What "is" equality or freedom? What "is" justice or peace, etc.? The answer to these questions has to do with ultimate goals, which go beyond parties or ideologies. Any party or ideology that would answer this question according to its own "idea" will end up as a dictatorship. A Constitution or Law alone cannot make society just, equal, free and safe. By subjecting society to law alone without addressing the issue of power, without asking how the people themselves think about their lives, law will become a mere instrument of power, and all

freedom of mind will be prohibited. This already says something about the place of the Constitution in society.

Earlier I discussed that "Law" cannot be separated from "Power" and "Knowledge". During the days of Martial Law, we experienced the bitter consequences of a Power which had taken almost complete control over "Law" and "Knowledge." Both legislature and public discourse, as we remember, existed only within the boundaries set by the dictatorship; they existed only at its pleasure.

The dictatorship was a traumatic manifestation of how power is concentrated in Philippine society. After the fall of the dictatorship, however, and in spite of the rhetoric and euphoria of "People Power", Power is still an issue, and Law still seems to be powerless vis-à-vis this power. It is Power that rules the relations between the rich and poor, between government and its bureaucracy and the "people" as a whole. It is Power which practically paralyzes such a democratic institution as elections.

Moreover, religion, education, health, labor, sexual interactions and family relations reinforce these existing patterns of power. The priest, the teacher, the doctor, the patriarch, etc. generally still occupy the privileged positions in society. And though modernization may create the impression of bringing changes in these traditional patterns, the more the nation tries to modernize itself by becoming one of the newly industrialized countries (NIC), the more we are also confronted with a new alliance of power, namely that between politics and economy (to the detriment of basic social relations and structures, and of the environmental balance) and the more people get uprooted, becoming like nomads in their own country.

Human rights have to be situated in this context. They have to be seen as part of these dynamics. Modern society, as I have said, is characterized by the disentanglement between Power, Law, and Knowledge.

Law as law has to establish itself vis-à-vis Power. But Law also needs public space for free debate: it needs



awareness, people's organizations, freedom of speech and assembly, and so forth.

Power, as it pervades society, is a complex phenomenon. It does not only entail physical force or force of law, it has to do with an unidentifiable range of activities by which some can impose their will on others. During the Martial Law years a teacher in Mindanao told me: "Martial Law is not just something in Manila, it is everywhere: in our barrios, in our schools, in our families."

Putting power in its place requires a whole cultural revolution. Power has many faces and it has many ways of spreading itself: fear, deception, illusion, prestige, money and "show," submissiveness and arrogance. Its presence in politics and the media, in economy and education, etc. manifests its ambivalence. While politics and economic activities, media and education can be instruments of empowerment, of awareness, of freedom, of equality, the embodiment of a sense of justice and dignity, etc. they can be, and indeed they have been, as much instruments of Power to intrude and dominate. Our commitment to human rights has to be situated within these social dynamics of Law, Power and Knowledge.

### The Commission on Human Rights

When the Constitution opted for the formation of a constitutional Commission on Human Rights, it apparently sensed its own limitations and vulnerability. It humbly asked itself whether democratic rule, as commonly understood and as tradition goes in the Philippines, by itself would be a guarantee to face the challenges from the workings of power in this country.

In the last seven years, the CHR as a body has had to define its place to establish its position, in accordance with its constitutional mandate. The Constitution gave the CHR a certain degree of independence: it is not identified with the administration, at least in principle; its members are not co-terminus with the actual political powers; neither Malacañang nor Congress can summon

or sack individual commissioners. To give institutional "flesh" to this independence, the foremost task of the CHR itself, though, is also a test of the political will of the powers that be. What Christian Monsod, the immediate past Chairman of the Comelec, recently said of the Commission on Elections should be true also for you as agents of CHR: Your constituency is "not the appointing power, not the power of politicians in the community, not even your best friend in grade school who's asking you a small favor, or even another official in the Commission."

Human rights has to do with rights. The strong tendency among human rights advocates is to stick to the legal dimension of things. The majority of CHR officers are, in fact, lawyers.

The lawyer's position in society, however, is quite ambiguous. Being a servant and/or expert on the law, the lawyer also shares the ambiguities of the law. "Law" is a very complex concept, and lawyers are people one needs to explain its complexities. But they are people to avoid as well. "Lawyers" in the New Testament were, together with the Pharisees, models of hypocrisy. The "lawyer" in the days of St. Augustine was primarily a "canonist", a representative of the Papal authority. Present day "lawyers" are mostly formed in the Anglo Saxon or western (American) tradition, but they may also have some of the public speaker and manipulator of words of the classical period, and some of the medieval "canonist" as well.

But behind all these "role-models" and ambiguities, there is a more basic ambiguity. If the basis of law IS justice, what is justice? I attempted to define justice in this talk on a foundational and pre-ontological level. Justice is the justice being done to the Other in his/her nakedness, not on grounds of what one "is", of what one pretends/claims to "be". Earlier, in our reflection on human rights, I stressed this ethical foundation of all human rights: human rights are the rights of the "Other" in his/her naked humanness, before being "rights" that

"I" can claim (because of my position, money, prestige, etc., in short, my power).

Before whatever legality can be presented, human rights are human because of that claim that comes from the naked face and vulnerability, the helplessness of the "Other". This, and this alone, is what ultimately "legitimizes" whatever law there is. And this should be the supreme Law of any human rights advocate!

The spirit that should dwell in the CHR, in its offices and in the field, should be the urge to do justice to the least protected. Law should not be the end of our work, but the instrument of justice, of THIS justice. This demands a great deal of philosophical radicalism, a great deal of that wisdom which knows the ambiguity of all laws.

Our present-day situation in the Philippines is particularly precarious in this regard, since we have inherited the mind-set of the past decades, when advocacy or assertion of human rights was considered subversive. We cannot expect our work not to be controversial, and if it is, we had better examine our conscience. A sound sense of suspicion is in order in the kind of work we do. From the moment that we do not provoke any resistance, we should question ourselves: we may have already left the field of human rights behind us and have become servants of the partisan rights of the establishment.

A recent study on the CHR has tried to assess its role over the past seven years. One of its conclusions says that the CHR should not do the work which other agents are doing. Its role should rather be that of a catalyst. I would like to underline this recommendation. The danger, especially among lawyers and politicians, I guess, is that we look at human rights only in a positive manner.

This is the trend in the whole of present day Philippines. Positivism is that attitude of mind that takes things as they are "posed" or stated, without asking what is behind them. According to the late Mario Bolasco, philosophy professor and author of significant essays like

"Point of Departure" (Manila 1994), this is happening in our educational system. The same is happening in the judiciary, in politics, and in the business sector. The ultimate agreement against legalistic positivism is the fact that the "human", not the idea but its concrete "face" (the naked face of the defenseless), is the ultimate point of reference and highest law within the realm of government and public life.

Indeed, the CHR cannot be anything but a catalyst: it must be the ear to hear the often suppressed cries of the powerless, the eye to see what is not seen by the officialdom which rules our laws and our politics, the space and the sounding board for the voiceless.

## Endnotes

<sup>1</sup> "All that is solid melts into air" is a quotation from *The Communist Manifesto*. Describing the process of modernization brought about by the bourgeois revolution Karl Marx wrote: "Constant revolutionizing of production, uninterrupted disturbances of all social relations, everlasting uncertainty and agitation, distinguish the bourgeois epoch from all earlier times. All fixed, fast-frozen relationships, with their train of venerable ideas and opinions, are swept away; all new-formed ones become obsolete before they can ossify. All that is solid melts into air, all that is holy is profaned, and men are at last forced to face with sober senses the real conditions of their lives and their relations with their fellow men."

<sup>2</sup> On les and proletariat see Terry Eagleton, *After Theory*, London, 2003, p. 42.

<sup>3</sup> On Rosa Parks see Michael L. Tan, "An American Heroine," *Philippine Daily Inquirer*, November 4, 2005, p. 13.

## References

- Eagleton, Terry (2003) *After Theory*, London.
- LeFort, Claude (1999) *La Complication. Retour sur le communisme*, (The Complication. Re-opening the Question of Communism) Paris, Fayard.
- \_\_\_\_ (1988) "The Permanence of the Theo-Political? The symbolism of the King's Body", pp. 213-255 and "Rereading: The Communist Manifesto - Karl Marx", pp. 149-162, *Democracy and Political Theory*, Minneapolis, University of Minnesota Press.



\_\_\_\_\_. (1986) "Politics and Human Rights", *The Political Forms of Modern Society*, Cambridge, Polity Press.

Levinas, Emmanuel (1991) "Droits de l'Homme et Bon Volonté" (Rights of Man and Good Will), *Entre Nous, Essais sur le penser-à-l'autre*, Bernard Grasset, Paris, pp. 231-236.

\_\_\_\_\_. (1987) *Les Droits de l'Homme et les Droits de l'Autre* (Rights of Man and Rights of the Other), *Flors Siget, Fata Morgana*, pp. 175-187.

Tan, Michael L. (2005) "An American Heroine", *Philippine Daily Inquirer*, November 4.



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#### HISTORY, THEORIES OF SOURCES AND DEVELOPMENT OF HUMAN RIGHTS\*

Jorge R. Coquina

"Human rights are as old as human society. They are rights men asserted at the beginning against injustices of tyrannical princes of ancient nations and the royal autocratic kings and princes of the medieval era – the nine theories of sources of human rights."

Human rights are as old as human society itself. Originally known as "Rights of Man," they are asserted by the citizens against tyrannical governments. They arose from the struggle of man against injustices of despotic rulers. From the tyrannical rulers of ancient Greece to the royal autocracy of kings and princes of the Middle Ages, men began to resist injustices they had long suffered. Men revolted against the concept of the "Divine Right of Kings." Socrates, considered the father of philosophy, was a victim of human rights violation. His honest and energetic stand on political questions brought him into disfavor with the state authorities and he was accused of corrupting the youth of Athens by teaching things not in accord with the popular mythology. He was condemned to die by drinking the deadly hemlock in the year 399 B.C.

Aristotle, the foremost Greek philosopher, did not favor slave ownership but history has shown that slavery became a legalized institution. The ancient Romans, who were known as lawgivers, formulated excellent legal codes, but legalized the possession of slaves under the Roman Law. It was only in the early 20<sup>th</sup> century when slavery was internationally prohibited.

\* Reprinted from Human Rights: An Introductory Course, Quezon City: Central Professional Books, Inc., 2000, Chapter 2.



In the Middle Ages, the great English document, Magna Carta, was delivered by King John on June 9, 1215. Regarded as the first English Constitution, the document guaranteed personal liberties and civil rights.

The revolutionaries of England, determined to prevent arbitrary royal rule, laid down in the Bill of Rights of 1689 such rights as freedom from cruel and unusual punishment and excessive fines.

The Americans, revolting against the English king, declared their own Bill of Rights, which they adopted in 1776, asserting that all men are by nature fully free and independent, and have certain inherent rights such as enjoyment of life and liberty, the means of acquiring and possessing properties, and obtaining happiness. They asserted freedom of speech and of the press, the right to speedy and public trial by an impartial jury, and the freedom to exercise religion.

Likewise, the French revolutionaries of 1789, revolting against their tyrannical King, proclaimed the "Declaration of the Rights of Man" previously denied them by the rulers. They declared that all men are born free and equal and affirmed the inalienable rights of man. Eventually, most democratic countries adopted in their respective constitutions, laws and statutes the principles of the constitutional guarantees in their Bill of Rights.

### Theories of Sources of Rights

Several theories on the source or origin of human rights have been advanced, namely: (1) *religious or the theological approach*, (2) *the natural law theory*, (3) *the positivist theory*, (4) *the theory of Marxism*, (5) *the sociological approach*, (6) *the utilitarian theory*, (7) *theories of justice*, and (8) *the theory based on equality and respect for human dignity*.

#### *Religious or Theological Approach*

Central to the doctrines of all religions is the concept of the dignity of man as a consequence of human rights. This is the doctrine of a Supreme Being, the creator, the Father of all humanity. If we accept the story of the Old

Testament that Adam, the first man, was created in the image of God, this means that the Divine source gives human beings a high value or worth. The belief in a universal common creation means a common humanity and consequently universal, basic and fundamental rights. Since rights come from a Divine source, they are inalienable and cannot be denied by mortal beings (man). The theological approach means also the brotherhood of men and equality in the eyes of God. Theology, therefore, is a basis of human rights theory stemming from a law higher than the state and whose source is the Supreme Being. They are not concessions granted by human institutions or states or any international organization, as they are God-given rights.

The criticism of the theological approach is that some religions impose so many restrictions on individual freedoms. Some religions even tolerate slavery, discrimination against women and the imposition of the death penalty.

The theological approach is valid as long as men believe that God created them. It is the interpretation of man loving his neighbor. The concept of brotherhood of men means respecting the rights of man. This also illustrates the universal concept of human rights. In short, the dignity of the human person is realized through love of fellowmen.

#### *The Natural Law Theory*

The natural law theory, which originated from the Stoics and was elaborated by Greek philosophers Plato and Aristotle and later by ancient Roman law jurists, perceives that the conduct of men must always conform to the law of nature. Natural law embodies the elementary principles of justice which are right by reason, i.e., in accordance with nature, unalterable and eternal.

Thomas Aquinas, who was foremost among medieval philosophers, considered natural law as law of right reason in accordance with the law of God, commonly known as the scholastic natural law (Aquinas, *Summa*



*Theologica* Part II, rommen, *Natural Law*, 1948). Natural law conferred rights upon individuals viewed as part of the law of God. The modern theory of natural law stressed by Hugo Grotius, considered the father of International Law, detached natural law from religion but laid the basis for several forms of natural rights. These natural characteristics of human beings are the social impulse to live peacefully and in harmony with others. Whatever conformed to the nature of men as natural human beings was right and just. Whatever is disturbing to social harmony is wrong and unjust (Grotius, *De Jure Belli Ac Pacis*, Libri Tres, Kalseng Trans 1925). Thus, the idea of human rights appeals to everyone whatever culture or religion one belongs to.

John Locke envisioned human beings in a state of nature. In that state, they enjoyed life, liberty and property, which are deemed natural rights.

The theory of natural law became the basis for the natural rights of man against oppressive rulers. The natural law theory found its way into the first human rights document known as the Magna Carta of England in 1215, as well as in the English Bill of Rights of 1689 and the American Declaration of Independence in 1776. Natural law theory has served as the norm or standard for state-enacted positive law. When the Nazi army generals who were prosecuted in the Nuremberg Tribunal for various offenses such as mass killing of children, women and non-combatants and genocide, put up a defense of *nullum crimen sine lege*, that is, "there is no crime unless there is a pre-existing law condemning the act as crime," the judges of the tribunal resorted to natural law. The crimes committed were offenses against humanity and there is no need for a law penalizing the acts.

The main characteristic of natural law is that it leaves vague what is part of the law of nations and, therefore, is inalienable.

#### *Historical Theory*

The historical theory advocates that human rights are not deliberate creation of the effort of man but have

already existed through the common consciousness of the people of what is right and just. Human rights are developed through the common consciousness of men. Unlike the positivist theory, the historical theory believes that human rights exist through gradual, spontaneous and evolutionary process without the arbitrary will of any authority. Examples are customs and traditions (Savigny, 1994).

#### *The Functional or Sociological Approach*

Under the functional or sociological theory, human rights exist as a means of social control. Also known as the sociological approach, human rights exist to serve the social interests of society. The sociological approach lays emphasis on obtaining a just equilibrium of multifarious interests among prevailing moral sentiments and the social and economic conditions of the time and place. It is the pragmatic principle. William James advocated, that the essence of law is simply to satisfy the needs of the people. This approach was developed in the early twentieth century when there were demands for a variety of wants occasioned by the development of a society such as help for the unemployed, the handicapped, the underprivileged, minorities and other disadvantaged groups. The approach is now to focus on rights in terms of people's wants and concerns (R. Pound, Jurisprudence 1959).

#### *The Positivist Theory*

The positivist theory, or what is known as legal positivism, states that all rights and authority come from the state and what officials have promulgated. Under this theory, the only law is what is commanded by the sovereign. The source of human rights is to be found only in the enactment of a law with sanctions attached. Natural law and natural rights can be valid only if they can be enforced by the state. A right is enjoyed only if it is recognized and protected by legislation promulgated by the state. The source of rights can be found only in the promulgated law and enforced by the state. It is the



will of the sovereign. Jeremy Bentham and John Austin, foremost positivists who were also advocates of law reform, stressed that the state's legal processes bear upon the protection of human rights. The promotion and protection of human rights becomes easier and more effective by resolving specific concrete violations of rights.

A positivist system offers flexibility to meet changing needs since it is under human control. The main criticism against the positivist theory is that the authority that promulgates the law may not promote human rights. It might even be against human rights. If positive law is the only source of law, then the law must be obeyed no matter how immoral it may be. The anti-Semitic laws of the Nazis were obeyed as positive law. Positivism can undermine international law because of its emphasis on the supremacy of the national sovereignty.

#### *The Marxist Theory*

This theory emphasizes the interest of society over that of the individual. Individual freedom is recognized only after the interest of society is served. It is concerned with economic and social rights over civil or political rights of the community. In a capitalistic society where few men control the means of production, an individual's needs and rights are never satisfied. The economic and social rights in many international instruments of human rights are claimed to be derived from the Marxist theory of equitable distribution of wealth and economic resources. Marx regarded the natural law approach as very idealistic. He saw nothing inalienable about human rights. Such concepts of law, justice, morality, democracy, freedoms are historical categories whose content is determined by the natural conditions of the life of the people. The inclusion of economic and social rights among the international instruments is attributed to the theory of communist states (Berlin, 1958).

The Communist system of rights has been referred to as "parental", with the political body providing the

guidance in value choice. But the true choice is the government set by the state.

#### *Theory Based on Equality and Respect*

Equality with respect to basic liberty means the recognition of individual rights in the enjoyment of the basic freedoms such as freedom of speech, religion, assembly, fair trial and access to courts. Governments must treat all their citizens equally. For this purpose, governments must intervene in order to advance the general welfare.

Another type of equality involves opportunities in the availment of public services and equal treatment before the law.

Certain specific liberties such as freedom of speech, freedom of worship, right to join association, and freedom of opinion require special protection against government interference. They are the so-called preferred liberties, where usually the government imposes restrictions (R. Dworkin, 1972, p. 22.)

#### *The Theory Based on Justice*

Justice, it is said, is the greatest interest of man. Respect for human rights serves the ends of justice. Each person possesses inviolability founded on justice. The liberties of the individual can be achieved only in a just society. John Rawls in his *Theory of Justice* said that the first virtue of any social institution is justice. Rawls' theory is that each person possesses inviolability founded on justice. The rights secured for justice are not subject to political bargaining or to social interests (Rawls, *Theory of Justice*, p. 28.)

Each person has equal rights to the whole system of liberties. There is no justice in a community where there are social and economic inequalities. Thus, to maintain the self-respect and the dignity of the individual, social primary goods such as liberation, opportunity and income are to be distributed equitably.



### *Theory Based on the Dignity of Man*

Professors McDougal and Laswell follow the so-called value-oriented approach based on the protection of human dignity. This theory proceeds from the premise that human rights means sharing the values of all identified policies upon which human rights depend (McDougal, *et. al.*, 1980). The most important values are respect, power, knowledge, health and security. There is great disparity between the common demands of the people for human dignity and their achievement.

The ultimate goal of this theory is a world community where there is democratic sharing and distribution of values. All available resources are utilized to the maximum and the protection of human dignity is recognized. This theory, in fact, is better referred to as policy science approach.

### *The Utilitarian Theory*

The utilitarian theory, which is mainly based on the philosophy of the English jurist Jeremy Bentham, seeks to define the notion of rights in terms of tendencies to promote specified ends such as the common good. Bentham believes that every human decision is motivated by some calculation of pleasure and pain. The goal is to promote the greatest happiness of the greatest number. Governments are to be judged not by reference to individual rights but in terms of their tendencies to promote the greatest happiness of the greatest number. Under this doctrine, everyone is counted equally. Utilitarianism is the principle that requires governments to maximize the total net sum of citizens' welfare. This is in contrast to the natural rights theory, which is an individualizing principle that assigns specific basic interests to each individual person (Bentham, 1931, p. 52).

Another type of Utilitarian Theory was advocated by Rudolf Ikerling, who emphasized that an individual cannot be more important than the entire group. A man cannot simply live alone in disregard of his impulse to society. This is similar to what Aristotle said that man is

a social animal. The composite society, of which the individual is a unit, has its own wants, claims and demands. An act is good only when it takes into consideration the interests of the society and tends to augment the happiness of the entire community.

### **Human Rights as an International Concern**

The struggle for the respect of human rights was originally a domestic or national issue. The citizens of the state asserted their rights against their tyrannical rulers. The atrocities committed on masses of people during World War II convinced international jurists that the protection of human rights should be an international concern. It was for this reason that the reaffirmation of the fundamental human person and dignity and worth of human person became one of the objectives of the United Nations. On December 10, 1948, the basic norms and standards of human rights were proclaimed through the Universal Declaration of Human Rights. As a mere declaration, its provisions were not legally binding on States; hence, in 1966, the International Covenant on Civil and Political Rights which amplified the human rights principles in the Universal Declaration, was adopted. The human rights concept was further broadened with the adoption of the International Covenant on Economic, Social and Cultural Rights in the same year. The human rights provisions of the United Nations Charter, the Universal Declaration of Human Rights and these two covenants are now known as the International Bill of Human Rights. The two Covenants are legally binding on the States that signed and ratified them.

Human Rights became an international concern and is now a subject of International Law (Meron in Luard, 1989). Respect for human rights mainly concerns individuals without distinction as to nationality or citizenship. Violation of human rights are offenses without borders.



### Origin of Human Rights in the Philippines

Jose Rizal, the national hero of the Philippines, was the first and foremost victim of human rights violation in the country. For his written works denouncing the abuses committed on the Filipinos by the Spanish authorities and church friars, he was arbitrarily arrested and tried by his own persecutors, and executed at Bagumbayan on December 30, 1896.

Since 1896, educated Filipinos have been aware of the basic constitutional guarantees mentioned in the American and English Bill of Rights. The Malolos Constitution which was adopted on June 20, 1899 and which established a Republican government, contained several provisions on civil and political rights, such as those guaranteeing freedom from arbitrary arrest and detention, freedom from searches and seizures, freedom to choose domicile and freedom of religion (Arts. 6, 8, 9, 10, 11, 12, 13, 14 and 15). Upon assumption of U.S. sovereignty over the Philippines, President McKinley directed the application of the American Bill of Rights through his Instruction to the Philippine Commission in 1901. Said principles were reiterated in the Philippine Bill of 1902, the Philippine Autonomy Act of 1916, otherwise known as the Jones Law, and the Philippine Independence Act of 1934, known as the Tydings-McDuffee Law. The first Philippine Constitution adopted in 1935 and the 1973 Philippine Constitution both contained the Bill of Rights. The said rights are now known as civil and political rights.

The Filipinos were temporarily deprived of the enjoyment of civil and political rights during the military rule of Japan from 1942 to 1944. These were, however, restored immediately in 1945.

The Filipinos were again subjected to violation of human rights during the authoritarian rule of President Ferdinand E. Marcos. His administration was terminated during the February 1986 revolution. A new constitution was adopted in 1986 and took effect in 1987. This new constitution categorically states that the State values the

dignity of every human person and guarantees full respect for human rights (Art. III [11]).

A signatory of 26 International Human Rights Instruments, the Philippines has the biggest number of ratification of human rights instruments among the Asian states. Signed and ratified or acceded to by the Philippines are the International Covenant of Economic, Social and Cultural Rights (7 June 1974), International Covenant on Civil and Political Rights (23 October 1986), Optional Protocol International Covenant on Civil and Political Rights (22 August 1989), International Convention on the Elimination of All Forms of Racial Discrimination (15 September 1976), International Convention on the Suppression and Punishment of the Crime Of Apartheid (27 July 1987), International Convention on the Elimination of All Forms of Discrimination Against Women (5 August 1981), Convention on the Political Rights of Women (12 September 1957), Convention on the Rights of the Child (21 August 1990), Slavery Convention of 1926 (12 July 1955), Protocol Amending the Slavery Convention (17 November 1964), Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices (17 November 1965), Convention on the Suppression of the Trafficking of Persons and the Exploitation of Others (19 September 1952), Convention on Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (18 June 1986), the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (21 January 1965), International Convention on the Protection of All Migrant Workers and Members of Their Families (13 November 1993), Convention on the Nationality of Married Women, Convention on the Status of Stateless Persons (22 June 1955), Convention Relating to the Status of Refugees (22 July 1981), Convention on the Prevention and the Punishment of the Crime of Genocide (7 July 1950), Convention on Non-Applicability of Statutory Limitation on War Crimes and Crimes Against Humanity (15 May 1973), Protocol Additional to the Geneva



Convention of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (11 July 1987). The latest human rights international instrument is the establishment of the International Criminal Court to try war crimes and crimes against humanity.

Although it has been opened for signature since 1966, the International Covenant on Civil and Political Rights was acceded to by the Philippines only in 1986, when democracy was restored after the 1986 *Edsa Revolution*.

### Narrow Concept of Human Rights in the Philippines

Human rights was understood as civil and political rights which men asserted against their tyrannical rulers. The Magna Carta of 1215 and the Bill of Rights of the American revolutionists both referred to the guarantees of the enjoyment of individual liberties such as freedoms from arbitrary arrest and detention, freedom of speech and of the press, and freedom of religion. As society developed and progressed, and with the increase of multifarious activities especially in the field of economic development, the concept of human rights has been broadened and now covers practically all aspects of human activities in order that men can live as free and fully developed human beings. Quite unfortunately, however, the 1987 Philippine Constitution mentioned only civil and political rights. Under Art. XIII, Sec. 18 (1) of the Constitution, the Commission on Human Rights is empowered to investigate "all forms of human rights violation involving civil and political rights." Apparently, the delegates who drafted the 1986 Constitution were not fully aware of the broad concepts of human rights as envisioned in the International Bill of Rights consisting of the International Covenant of Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, and the various international instruments on human rights adopted by the United Nations and other international organizations. The delegates to the 1987 Constitutional Commission emphasized during the debate that, at the moment, the

Constitution is limited only to civil and political rights (*Records of the Constitutional Commission*, Vol. 2, pp. 722-723, 738-739).

The Philippine Supreme Court was likewise of the opinion that the function of the CHR is limited only to cases involving civil and political rights. In *Cariño vs. Commission on Human Rights*, 204 SCRA 483 (1991), it ruled that the most that may be conceded to the Commission on Human Rights is the power to investigate, i.e. receive evidence and make findings of fact as regards claimed human rights violations involving civil and political rights. The same ruling was made in *Simon vs. Commission on Human Rights*, 229 SCRA 7 (1994), when the Court said that it was apparent that the delegates who drafted the constitution envisioned a Commission on Human Rights that would focus its attention on the more severe cases of human rights violation. Constitutional delegate Garcia, for instance, mentioned such areas as "(1) protection of rights of political detainees, (2) treatment of prisoners and the prevention of tortures, (3) fair and public trials, (4) cases of disappearances, (5) salvaging and hamleting, and (6) other crimes committed against the religious. While the enumeration has not likely been meant to have any preclusive effect, more than just expressing a statement of priority, it is, nonetheless, significant for the tone it has set. In any event, the delegates did not apparently take scope of the investigatorial jurisdiction. They have thus seen it fit to resolve, instead, that Congress may provide for other cases of violations of human rights that should fall within the authority of the Commission, taking into account its recommendation."

The Court held in the Simon case that the demolition of stalls, sari-sari stores and carinderia does not fall under the compartment of human rights violations involving civil and political rights envisioned by the Constitution. These rights fall under the economic, social and cultural rights.

It is not surprising therefore that the Commission on Human Rights in its earlier Resolutions have limited its functions only to civil and political rights. Resolution



No. A89-109, July 19, 1989, of the Commission is one such resolution.

#### Status of Human Rights in the Philippines

Historically, the Filipino people have experienced violations of human rights from the colonial Spanish regime, when there was economic and class discrimination. The Filipinos also suffered from the brutal Japanese occupation of 1942-1945. Jose Rizal, the national hero who was imprisoned for his political ideas, was tried by a partial tribunal, was given no opportunity to defend himself, and was sentenced to death. Already aware of their human rights under the 1935 Philippine Constitution, many Filipinos also resisted the martial law and the authoritarian administration of President Ferdinand Marcos. People were arrested, detained and tortured without valid charges. There were forced disappearances of persons.

With the restoration of democracy in 1986, the Filipino people acceded to the International Covenant on Civil and Political Rights. In adopting a new constitution, a state policy is now provided in Article II, Section 11, which reads:

*"The State values the dignity of every human person and guarantees full respect and guarantees full respect for human rights."*

To implement the State Policy of protecting human rights, the Commission on Human Rights was created as an independent body under Art. XIII, Secs. 17-19 of the Philippine Constitution. In November 1997, the Philippines received a commendation from the United Nations Commission on Human Rights for its achievement of its program on education of the people on human rights. The statistics show a substantial decrease in the number of violations of human rights among law enforcement agencies. But there is still much to be done to achieve an ideal institution for the protection of the human rights of the people (See Muyor).

#### Philippine Foreign Policy on Human Rights

When the Philippines voted to admit Vietnam, Laos, and Myanmar as members of the ASEAN, non-governmental organizations involved in human rights as well as freedom-loving Filipinos were not happy, considering the very poor record of human rights of said countries. A newspaper columnist, Joaquin Bernas, SJ, commented that, with the admission of the dictatorial regime of Myanmar, human rights has become a "joke" for the ASEAN.

There is a further impression that there is not much political will to protect human rights of the Filipino nationals working abroad who are suffering from violation of their human rights. The general posture of the Department of Foreign Affairs in many instances is to sacrifice the rights of Filipino nationals who suffer violations of human rights abroad rather than protest, which might severely affect friendly relations with the states where Filipino migrant workers reside. The Secretary of Foreign Affairs was quoted in the press as stating that the Filipino nationals who were apprehended and detained by Saudi Arabian authorities for exercising their Christian faith were themselves to blame, knowing fully well that there is no religious freedom in that country. Instead of blaming the Filipino nationals, our foreign service officers should assist Filipino nationals who are in trouble, pursuant to the consular duties under the Vienna Convention on Consular Relations. It took United States President Clinton, the President of another nation, to arrange the release of some of the detained Filipino missionaries.

The Philippine Commission on Human Rights also urged the Philippine Senate to ratify the Second Optional Protocol on the International Covenant on Civil and Political Rights recommending the abolition of death penalty in their statutes. UN statistics show more than half of the member States have already abolished the death penalty in their statutes.

## References

- Bentham, J. (1931) *Theory of Legislation*, p. 52.
- Berlin (1958) *Two Concepts of Liberty*.
- Dworkin, R. (1972) *Taking Rights Seriously*, p. 22.
- Grotius (1925) *De Jure Belli Ac Pacis*, Lubri Ties, Kalseng Trans.
- McDougal, Laswell and Chess (1980) *Human Rights and World Public Order*.
- Meron, T. (1989) *Human Rights in the International Law*, Oxford: Clarendon Press.
- Muyut, A. *Human Rights in the Philippines 1986-1992*, Institute of International Legal Studies, University of the Philippines Law Center.
- Pound, R. (1959) *Jurisprudence*.
- Savigny (1831) *On the Vocation of our Life, Legislation and Jurisprudence*, Harvard.
- Simon vs. Commission on Human Rights, 229 SCRA 7, 1994.
- American Declaration of Independence of 1776.
- Carño vs. Commission on Human Rights, 204 SCRA 483, 1991.
- Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (18 June 1986).
- Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (21 January 1965).
- Convention on the Nationality of Married Women, Convention on the Status of Stateless Persons (22 June 1955).
- Convention on Non-Applicability of Statutory Limitation on War Crimes and Crimes Against Humanity (15 May 1973).
- Convention on the Political Rights of Women, 12 September 1957.
- Convention on the Prevention and the Punishment of the Crime of Genocide (7 July 1950).

Convention on the Rights of the Child, 21 August 1990.

Convention on the Suppression of the Trafficking of Persons and the Exploitation of Others (19 September 1952).

Convention Relating to the Status of Refugees (22 July 1981).

English Bill of Rights of 1689.

Forms of Discrimination Against Women, 5 August 1981.

International Bill of Rights.

International Convention on the Suppression and Punishment of the Crime of Apartheid, 27 July 1987.

International Convention on the Elimination of all Forms of Discrimination Against Women, 5 August 1981.

International Convention on the Elimination of All Forms of Racial Discrimination, 15 September 1976.

International Covenant on Economic, Social and Cultural Rights, 7 June 1974.

International Covenant on Civil and Political Rights, 23 October 1986.

International Convention on the Protection of All Migrant Workers and Members of Their Families (13 November 1993).

Magna Carta of England of 1215

Optional Protocol International Covenant on Civil and Political Rights, 22 August 1989.

1987 Philippine Constitution

Protocol Additional to the Geneva Convention of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (11 July 1987).

Protocol Amending the Slavery Convention (17 November 1964).

Records of the 1986 Constitutional commission, vol. 2.



Slavery Convention of 1926, 12 July 1955.

Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices (17 November 1965).

UN Charter.

Universal Declaration of Human Rights.



## CHAPTER 3 Selected Issues and Debates on Human Rights

### *Universality vs. Cultural Relativism*

#### ASIAN PERSPECTIVE ON HUMAN RIGHTS: PERCEPTIONS, PROGRAMMES AND PRACTICES\*

*Vijit Muntarbhorn*

##### Introduction

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These contrasting configurations indicate that it would be difficult to generalize about the human rights perspective in Asia. Asia is perhaps too heterogeneous for a unified approach to human rights. Moreover, the human rights situation varies from one country to another.

As noted by the World Report 2000 of HUMAN RIGHTS WATCH:

*"Human rights fared poorly in Asia during the year (1999), and nowhere as badly as in East Timor. No outside country*

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and no institution, regional or global, put the necessary pressure on Indonesia to stop the deadly violence of its proxy militias until a scorched earth campaign in September left the soon-to-be-independent country a smoking ruin and virtually its entire population uprooted... The fundamental civil rights of expression, assembly, and association suffered severe setbacks during a year in Pakistan, China, Burma, Malaysia, Singapore and Cambodia... Internal armed conflicts in Sri Lanka, Afghanistan, Indonesia and Burma produced human rights violations by all parties... Governments in Pakistan and Afghanistan failed spectacularly to uphold women's rights, and violence against women was a pervasive problem in the region... On the positive side, economic recovery and democratization made steady progress. The more open countries in the region, Thailand and South Korea, recovered rapidly from the effects of the 1997-98 economic collapse..."

With the challenge of contrasts in the region, it would be intriguing to probe how human rights are viewed in Asia and the potential to divergence and convergence.

### Perceptions

How are human rights perceived in Asia? The answer is that there is more than one perception. Differing perceptions are particularly to be found between governments and non-governmental organizations (NGOs). For instance, in the lead-up to the 1993 World Conference on Human Rights held in Vienna, representatives of Asia-Pacific countries met in Bangkok to concretize a regional stance on human rights. What resulted were, in fact, two stances—one highlighting the governmental viewpoint and the other underlining the non-governmental viewpoint. The former was represented by the 1993 "Bangkok Declaration" (on human rights) and the latter was represented by the 1993 "Bangkok NGO Declaration on Human Rights".

The divergence in approach can be tested from the following angles:

#### 1. *Universality of Human Rights*

In international law, this refers to the primacy of international human rights law and principles as the basic minimum standards applicable everywhere, guaranteed by a range of international human rights instruments and mechanisms. The bottom line is that where there is a conflict between international norms and national practices, the former must prevail.

Some Asian governments, especially the less liberal ones, are uncomfortable with or do not accept the notion of universality of human rights. They advocate State sovereignty and non-interference in the internal affairs of a State as primordial. They view human rights violations as internal affairs, while the international perspective would view them as international matters of concern to the world. Moreover, these governments do not accept the primacy of international norms but are ready to subject them to regional and national "particularities". The bottom line is that for them, where there is a conflict between international human rights standards and regional/national practices, the latter should prevail over the former.

At the practical level, it means that many Asian States are reluctant to become parties to international human rights treaties which are part of such universality. Many have not acceded to key international human rights treaties, such as the 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and their Protocols. The only treaty to which all Asian countries are parties to is the 1989 Convention on the Rights of the Child (CRC). When they accede to human rights treaties, there is also a tendency to make broad reservations to limit their acceptance of rights or reject some rights outright, e.g. in regard to the rights of refugees.

In the Bangkok Declaration, the above stance was visible in the following provisions:

"5. Emphasize the principles of respect for national sovereignty and territorial integrity as well as non-

interference in the internal affairs of States (and the non-use of human rights as an instrument of political pressure...)

8. Recognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds."

By contrast, NGOs took a more universalist approach to human rights in the Bangkok NGO Declaration on Human Rights, which strongly advocated the universality of international human rights standards and its primacy over regional/national particularities, such as violations of women's rights, as seen in the following:

"1. Universality. We can learn from different cultures in a pluralistic perspective and draw lessons from the humanity of these cultures to deepen respect for human rights. There is emerging a new understanding of universalism encompassing the richness and wisdom of Asia-Pacific cultures.

Universal human rights are rooted in many cultures. We affirm the basis of universality of human rights which afford protection to all of humanity, including special groups such as women, children, minorities and indigenous peoples, workers, refugees and displaced persons, the disabled and the elderly. While advocating cultural pluralism, those cultural practices which derogate from universally accepted human rights, including women's rights, must not be tolerated.

As human rights are of universal concern and are universal in value, the advocacy of human rights cannot be considered to be an encroachment upon national sovereignty."

At the 1993 World Conference itself, the compromise reached between governments globally was based upon the following provisions in the Vienna Declaration and Programme of Action, confirming the primacy of

universality of human rights, while bearing in mind particularities as follows:

"5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."

## 2. Indivisibility of Human Rights

This refers to the integrated interlink between civil, political, economic, social and cultural rights. In essence, it implies that civil and political rights such as freedom of expression, of thought, of religion and of association must be guaranteed concurrently with such economic, social and cultural rights as the right to education and to an adequate standard of living.

Some Asian governments are uncomfortable with or do not accept the indivisibility of human rights. In particular, they prefer to advocate economic, social and cultural rights instead of civil and political rights. Rather than guaranteeing them concurrently, they advocate that economic, social and cultural rights must be fostered first, and civil and political rights only later. This sequential approach means that "rice" comes before "rights".

NGOs are well aware that through such sequencing, rights become divisible rather than indivisible – a position which they and the international community reject. The NGO stance was underlined by the "Bangkok NGO Declaration on Human Rights" as follows:

"2. Indivisibility. We affirm our commitment to the principle of indivisibility and interdependence of human rights, be they civil, political, economic, social or cultural rights. The protection of human rights concerns both individuals and collectives. The enjoyment of human rights



implies a degree of social responsibility to the community....

Violations of civil, political and economic rights frequently result from the emphasis on economic development at the expense of human rights. Violations of social and cultural rights are often the result of political systems which treat human right as being of secondary importance.

Economic rights involve a fair distribution of resources and income, the right to freedom from hunger and poverty. These can only be protected where people are able to exercise their civil and political rights, for example, the right of workers to organize and form unions to protect their economic rights. Poverty arises from maldistribution in the face of systemic denial of human rights.

*There must be a holistic and integrated approach to human rights. One set of rights cannot be used to bargain for another."*

The compromise reached between governments at the 1993 World Conference was based upon the passage cited above. It indicates the primacy of indivisibility of human rights, while bearing in mind regional and national particularities.

### 3. Rights and Duties

Another major debate in the Asian region is that concerning rights and duties: which come first? Less liberal governments are prone to advocate that human duties or responsibilities towards the State and towards other humans come before the need to respect human rights. In 1997, a think tank tried to draft a Universal Declaration of Human Responsibilities which would have satisfied these governments, especially by implying broad powers for governments to constrain freedom of expression. The attempt failed. NGOs in the Asian region reacted by adopting the Universal Declaration on the Duties of Governments and Other Power Groups (1998) to highlight the duty of governments and other groups such as the business sector and non-government

armed groups to respect human rights. This NGO perception is illustrated as follows:

*"Article 1. All governments and other power groups, particularly non-government armed groups and business enterprises, are under a duty to guarantee that all human beings are born free and equal in dignity and rights."*

*Article 2. All governments and other power groups are obliged to promote and protect all rights and freedoms set forth in the Universal Declaration of Human Rights and other relevant instruments, without distinction of any kind, such as race, color, gender, sexual orientation, language, religion, political or other opinion, national, social or cultural origin, property, birth or other status."*

### 4. Asian Values

In recent years, the notion of Asian values has been propagated by less liberal Asian countries to indicate that marked economic growth in Asia has been due to strong leadership, diligence, deference to authority, and respect for families and communities. The bottom line of this argument is that individuals do not take precedence over the interests of the family and community and the decision making power of governments or States. By implication, the human rights of individuals are subordinate to the collective interest.

The sense of government confidence exuding from such argument was largely influenced by the so-called Asian miracle, in which a select group of countries experienced record growth of their Gross Domestic Product and exports. However, East Asia suffered a gigantic economic crash in 1997 and is still reeling from its consequences today. The advocacy of Asian values has thus been toned down since then in a decidedly less confident Asia, even though it still rears its head sporadically in less liberal circles.

A major concern is not only the content of what constitutes Asian values but also "who is making the argument?" Given that Asia is so heterogeneous, it is wiser to talk of "values in Asia" rather than "Asian



values". In this respect, there are many values in Asia, such as compassion, non-violence and respect for other human beings and the natural environment, which are universal in content rather than ethnocentric in emphasis. Yet, these are not recognized at all in the so-called 'Asian values' argument. From the angle of "who is making the argument?" the danger of this argument is that it is a viewpoint instrumentalized by less liberal or authoritarian governments or regimes for their own political ends and survival, rather than the genuine interests of individuals and communities. In any case, given the aftermath of the recent economic crisis, those alleged Asian values offer neither adequate preventive medicine nor therapeutic cure for contemporary ills, especially when tested against the backdrop of human rights.

### Programmes

It is well known that there is no inter-governmental human rights systems at the regional level in Asia. This differs from the situation in Europe, Africa and the Americas, all of which have such system with a variety of instruments and mechanisms ranging from regional Conventions to commissions and courts on human rights.

The only regional umbrella dealing with possible regional arrangements for the Asia-Pacific region is the periodic annual workshop of these countries under the aegis of the Office of the United Nations High Commissioner for Human Rights. To date, workshops have been held in the following venues: Manila 1990, Jakarta 1993, Seoul 1995, Kathmandu 1996, Amman 1997, Teheran 1998, Delhi 1999, and Beijing 2000. The approach adopted by the governments attending these workshops is a step-by-step approach under the term "building blocks", whereby various orientations are highlighted for action and cooperation without necessarily leading to a regional inter-governmental human rights system. The four key areas for such action and cooperation agreeable to these governments are:

- development of national human rights action plans;
- development of national institutions, such as national human rights commissions, for the promotion and protection of human rights;
- development of human rights education;
- strategies for the realization of the right to development and economic, social and cultural rights.

Details of the latest activities on this front at the country level are given in the section below.

The earlier workshops were instrumental in promoting dialogue between Asia-Pacific countries and enunciating an approach acceptable to Asia-Pacific countries with different socio-cultural and political constituents. For example, the Conclusions of the 1998 Teheran Workshop underlined the following convergent areas:

- reaffirmation of the universality, indivisibility and interdependence of human rights "in a region proud of its rich cultures, religions and diversities";
- reaffirmation of the commitment to the Vienna Declaration and Programme of Action (of the World Conference on Human Rights);
- emphasis on a step-by-step and building blocks approach;
- commitment to developing and strengthening national capacities, in accordance with national conditions, as the strongest foundation for regional cooperation; and
- adoption of a Framework for Regional Technical Cooperation for the promotion and protection of human rights.

The technical cooperation element is new and is leading to more support for a programmatic response



based upon activities in the region dealt with below. This was reinforced at the 1999 Delhi Workshop, particularly in terms of concrete financial allocations for the region.

In the meantime, 1999-2000 witnessed another innovation: the organization of inter-sessional workshops for Asia-Pacific countries to deal specifically with the four key areas identified above in greater detail. The Workshop on the Development of National Plans of Action for the Promotion and Protection of Human Rights in the Asia-Pacific Region was held in Bangkok in July 1999. The Conclusions from the Workshop highlighted the following:

- the development and implementation of national human rights action plans may significantly advance human rights promotion and protection;
- broad national participation has a key role in the development of such plans
- all governments are encouraged to develop such plans in accordance with national priorities.

The workshop also suggested possible elements of what should be included in a national human rights action plan, e.g. establishment of a national coordination committee for the development of such plans, identification of key groups and issues for action, measurable benchmarks, and monitoring and evaluation of the implementation of these plans.

With regard to national human rights institutions, the Asia-Pacific region already has a network of these institutions in the form of the Asia-Pacific Forum of National Institutions organized particularly to share information and strengthen ties, and for the past few years, its members have met annually with the support of the United Nations. It has also set up an Advisory Council of Jurists composed of eminent jurists from the region to help evolve, in a non-binding manner, human rights jurisprudence. The Fourth Annual Meeting of the

Asia-Pacific Forum of National Human Rights Institutions was held in Manila in September 1999 and its Conclusions reaffirmed the need for national human rights institutions to be independent and pluralistic. Various key issues discussed included national human rights institutions in advancing the human rights of women; national institutions and non-governmental organizations: working in partnership; the role of public inquiries in promoting and protecting human rights.

With respect to human rights education, two workshops were organized with the support of the United Nations in 1999-2000. The Sub-regional Training Workshop on Human Rights Education in Northeast Asia was held in Seoul in December 1999. Its Conclusions underlined the need for countries to adopt a national strategy in accordance with the United Nations Guidelines for National Plans of Action for Human Rights Education and the United Nations Decade for Human Rights Education 1995-2004. It emphasized particularly:

- The need for training of teachers and other educational personnel;
- The need for curriculum development and extra-curricular activities on human rights;
- The need for law and policies supportive of human rights education;
- The need for human rights education in the classroom, including the call for classroom/school management to ensure that a human rights culture prevails in the classroom.

The issue of human rights education was taken farther, from the angle of national planning, at the Inter-sessional Workshop on National Plans of Action for Human Rights Education in the Asia-Pacific Region held in Tokyo in January 2000. The Conclusions from the Workshop identified key orientations for the Asia-Pacific region, including the following:

- Human rights education should take an integrated approach to encompass all human rights-civil, political, economic, political, social and the right to development;
- It should strike a balance between rights and responsibilities as recognized by the Universal Declaration of Human Rights and other international instruments;
- Human rights education should be participatory, pluralistic and non-discriminatory;
- National human rights action plans are important for promoting a human rights culture;
- Human rights education for all those involved in the administration of juvenile justice is a priority;
- The human rights education needs of the vulnerable and marginalized must be met;
- National human rights education plans should be a component of or complementary to national human rights action plans and other relevant plans;
- National plans should be based upon needs assessment and country priorities;
- Human rights education should be integrated into all levels of formal education; training of professional awareness raising, and law and policy reform;
- Adequate resources need to be allocated for human rights education, and this is linked with potential for assistance from the United Nations Technical Cooperation Programme in the Field of Human Rights;
- An important occasion for assessing the impact of national plans is the global mid-term review of the United Nations Decade for Human Rights Education.

In regard to economic, social and cultural rights and the right to development, the Inter-sessional Workshop on Economic, Social and Cultural Rights and the Right to Development in the Asia-Pacific Region was held in Sana'a in February 2000. It underlined the following concerns:

- It affirmed that effective public participation, including the full participation of women, of civil society, including NGOs and the private sector, is essential for implementing the right to development;
- It identified various key obstacles to be addressed, including extreme poverty, environmental degradation, excessive foreign debt, unilateral coercive measures, unbalanced trade regime, limited access to technology and marginalization in the social and economic fields;
- It affirmed the important role of the human rights treaty system as a legal framework for tackling economic, social and cultural rights;
- It called upon States and other actors to bear in mind human rights in national development planning;
- It affirmed the importance of international cooperation and official development assistance to address these issues.

An illustrative framework for evaluating the implementation of economic, social and cultural rights and the right to development was also evolved for the workshop. This included the interrelationship between countries and the International Covenant on Economic, Social and Cultural Rights, the current country situation in such areas as social security, education, standard of living and employment, follow-up to the World Summit on Social Development (1995) and development cooperation.



The four areas of concern addressed through these inter-sessional workshops were channeled to the most recent Asia-Pacific Workshop: the Eighth Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region held in Beijing in March 2000. The Conclusions from the Workshop reinforce measures in favor of national human rights action plans, human rights institutions, human rights education, and the realization of economic, social and cultural rights and the right to development, with more targeted programming and activities linked with the United Nations-supported Framework for Regional Technical Cooperation for the Asia-Pacific Region. The new thrust is to implement more programs based upon activities at the regional, sub-regional and national levels in the four areas mentioned over the next 24 months, taking into account the World Conference against Racism in the year 2001. Examples of these programs include:

1. For national human rights action plans:
  - regional level: a) disseminate the United Nations-supported handbook on the development of national action plans; b) promote training for reporting to human rights treaty bodies
  - sub regional level: a) organize a sub-regional workshop on national human rights planning with emphasis against poverty, combating racism and on women's and children's rights; b) organize a sub-regional technical workshop on human rights for parliamentarians; c) offer technical cooperation to states to develop such plans
  - national level: a) provide technical support to developing countries to evolve

national human rights action plans

2. For national human rights institutions:
  - regional level: a) provide support for the annual meetings of the Asia-Pacific Forum of National Institutions, especially in the preparations for the World Conference Against Racism; b) assist the training programme on protection approaches
  - sub-regional level: a) support the inter-sessional workshop on the role of national institutions in the protection of women's rights (to be held in Fiji) and one another workshop on media and human rights education; b) co-organize another course on economic, social and cultural rights targeted to national institutions.
  - national level: a) support the strengthening of national institutions; b) encourage activities on women's rights, child rights and the rights of vulnerable groups
3. For human rights education:
  - regional level: a) conduct and disseminate the findings of surveys on human rights material and programmes in the region; b) publish a study on popular and non-formal education methodologies on human rights

- sub-regional level: a) organize three sub-regional workshops to develop human rights training programmes, including for those in the administration of justice and for marginalized groups;
- b) organize a human rights workshop for the judiciary;
- c) offer technical support for programming
- national level: a) provide technical support for human rights education plans and sectoral-based human rights education.

#### 4. For the realization of economic, social and cultural rights and the right to development:

- regional level: a) organize a workshop on the impact of globalization on economic, social cultural rights and the right to development as related to vulnerable groups
- sub-regional level: a) organize a workshop on ratification of the International Covenant on Economic, Social and Cultural Rights and related reporting obligations;
- b) organize a workshop on the integration of human rights into national development plans;
- c) other technical assistance
- national level: a) provide technical assistance and advisory services on the issue

In the future, therefore, it is expected that there will be more activities in building the capacity of key actors to respond to human rights in the region. However, as always with human rights, it is not so much the

perception or the program which is problematic, but its implementation in practice.

From another angle, at the regional level, the NGO sector in Asia is active and well coordinated on many fronts. There are NGOs dealing generally with human rights and those dealing with specific issues such as women's rights and child rights. They play a pivotal role in advocating human rights, monitoring their implementation, and assisting and protecting victims of violations. They have built a variety of networks ranging from general human rights matters to specific concerns such as women's rights and child rights. Led by the NGO called Asian Human Rights Commission based in Hongkong, a number of NGOs adopted in 1997 the non-governmental Asian Human Rights Charter. The thrust of the Charter is to advocate various key actions including:

- Strengthening of guarantees for human rights in national institutions;
- Ratifying human rights treaties;
- Advocating review of domestic laws inconsistent with human rights standards;
- Maximizing the role of the judiciary in enforcing human rights;
- Enable social organizations to litigate on behalf of the victims;
- Establishing national human rights protection;
- Setting up People's Tribunals which are not based upon adjudication but which help to raise consciousness of people's problems guided by moral and spiritual foundations.

Interestingly, this Charter does not only advocate human rights but sustainable development and other essentials such as democracy and peace. At times, it posits various rights not yet recognized internationally. For example, it advocates the right to cultural identity,



an element not yet clearly found in international instruments in this manner:

*"The Asian traditions stress the importance of common cultural identities. Cultural identities help individuals and communities to cope up with the pressures of economic aid and social change; they give meaning to life in a period of rapid transformation."*

On another front, at the sub-regional level, there are various burgeoning intergovernmental human rights systems. In West Asia, there is the Arab Charter on Human Rights (1994). It is not yet in force, although ratified by Iraq and Syria. It stipulates a variety of rights and provides for a monitoring committee. Many of the rights under the Charter such as the right to life, liberty and equality before the law are similar to international standards at first glance. However, the Charter tends to differentiate between the rights of citizens and those of other persons; this would counter the principle of non-discrimination which is at the heart of international human rights norms. The Charter also fails to recognize the right to freedom from slavery and the right to change one's religion. Reference in the Charter to national security may also provide too many constraints on the enjoyment of human rights.

There are also attempts to deal with human rights issues in a more specific manner at the sub-regional level. For example, South Asia has been drafting a specific Convention against the trafficking of women and children. In the Association of South-East Asian Nations (ASEAN), there are currently attempts by NGOs to put forward a draft document to governments to establish an ASEAN Human Rights Commission which will take complaints from member States and individuals where the local remedies have been exhausted.

### Practices

In the light of the above developments, what are the practices at the national level in Asia? On the positive front, a greater number of countries are becoming

democratic and have discarded military regimes. In recent years, these include the Philippines, Indonesia, Thailand and East Timor. The right to self-determination has won, despite many traumas, in some settings such as East Timor. Many new laws and policies have been adopted in a wide range of countries to promote human rights. These range from new Constitutions to laws and policies to protect vulnerable groups such as women and children. Law enforcement has also been improved in some areas. For example, various investigations of human rights violations have led to the dismissal or resignations of key military personnel responsible for these violations, such as in Indonesia.

When tested against the four regional concerns mentioned above, progress has been made in some quarters. In regard to human rights action plans, Indonesia and the Philippines have adopted such plans and other countries, such as Thailand, are preparing to do so with the following commonalities:

- Linkages between the national setting and international human rights standards, implying that the latter can help to raise standards nationally, while not forgetting local wisdom;
- Coverage of at least civil, political, economic, social and cultural rights, with varying emphases on individual and collective rights, related obligations, and target issues, such as education, health, shelter, employment, poverty, and freedom of association and expression;
- Target groups in vulnerable positions such as women, children, the elderly and those with disability, to be assisted and protected;
- Suggested reforms of laws, policies, programmes, practices and mechanisms to improve human rights promotion and protection;



- Support for national institutions, such as national human rights commissions, for the promotion and protection of human rights;
- Partnership with key government agencies to implement the national human rights action plan;
- Capacity-building of power groups such as the police and judiciary to respect human rights;
- Cooperation with civil society, including NGOs, in the formulation and implementation of the plan;
- Allocation of resources to implement the plan;
- Establishment or identification of national monitoring mechanism to follow-up the implementation of the plan.

While these plans are welcome, there is much more room for their effective and sustainable implementation. A wider range of countries also needs to adopt them.

With regard to national human rights institutions, this is very much the flavor of the month. A number of countries have established national human rights commissions and they include Indonesia, the Philippines, India, Sri Lanka, and most recently Malaysia. Others about to establish their own commissions include Thailand, Nepal, Bangladesh, Cambodia and South Korea. The Pacific is represented by commissions in Australia, New Zealand and Fiji. Several of these commissions have done good work in advocating law reform and have undertaken key investigations which have led to the exposure of situations concerning human rights violations as well as greater accountability and an end to the impunity of the perpetrators. Several have active human rights education campaigns not only for the general public but also for law enforcers, including the military, the police and the judiciary. Some have become involved in not only civil and political rights but also economic, social and cultural rights, including action

against human trafficking affecting women and children. However, on the negative front, some of them are not as independent or pluralistic as they could be. There is thus the danger of manipulation by the government or existing power bases in some cases. For example, although Iran claims to have a national human rights commission, there is a lingering question concerning its independence. While Cambodia does not yet have a national human rights commission, it has a government-backed human rights committee as well as two other committees in parliament, none of which adequately satisfy the test of independence and pluralism advocated by the United Nations.

With respect to national human rights education, there is greater emphasis on such education in some Asian countries. For example, four Asian countries have specifically human rights education plans, namely Japan, the Philippines, Turkey and Uzbekistan. Thailand is finalizing her plan which will go hand in hand with its other plan - the national human rights action plan. The existing human rights education plans vary in shape and content. For instance, Japan's plan is much more linked with the United Nations and Japan's own history. It aims to promote human rights through the whole educational system, and the issues to be addressed include women's rights, child rights and the rights of ethnic minorities. The Philippine plan is more detailed with regard to the activities to be undertaken and sets the ambitious goal of 100% human rights literacy in the country. The target groups range from media, women, children to law enforcers and insurgents. Examples of planned programs to integrate human rights education into the community include client-based human rights education and training programmes for the military, police and other law enforcers; for academic circles; for local government units; for national government employees; for overseas contract workers; for NGOs; for the judiciary and prosecutors; and for special interest groups such as women, children and those with disabilities.



Current human rights education activities in the above countries are exemplified by the following:

- Decentralization of human rights education by means of local action plans in Japan;
- Japanese prefecture (Kanagawa's) human rights message exhibition against bullying and discrimination;
- Setting up of Barangay village level human rights action centers in the Philippines
- Production of human rights educational materials in the Philippines, such as manuals of child rights for law enforcers;
- Memorandum of Understanding between the Philippine Armed Forces and the Philippine Human Rights Commission to promote and protect human rights;
- Integration of human rights and humanitarian law concerned with the protection of civilians in armed conflicts into military courses in the Philippines;
- Establishment of human rights desk in the armed forces of the Philippines liaising with the Philippine Human Rights Commission;
- Training of human rights' trainers in the Philippines;
- Organization of networks for human rights' defenders in the Philippines;
- Integration of human rights into the educational curriculum in the Philippines;
- Use of village leaders to reach out to the community in the Philippines;
- Promotion of artistic and cultural campaigns for human rights in the Philippines;
- Establishment of an inter-agency task force at the national level and regional levels for human rights education in the Philippines;
- Creation of a national association of human rights educators in the Philippines;

- Cooperative agreement between the Philippine Human Rights Commission and various partners—governmental and non-governmental – to promote human rights education.

Despite these developments, a key challenge is that human rights education cannot only be based upon the quantity of the education available but must also be based upon the quality of the education. The impact on this front remains obscure in many settings. A critical question without an adequate answer so far is: have these plans and programs, in practice, led to major changes in the population's knowledge, attitudes and behavior towards human rights?

With regard to the fourth regional concern—the realization of economic, social and cultural rights and the right to development—the record in practice is mixed, aggravated by the aftermath of the economic crash of 1997. Poverty is the key issue facing many countries, compounded by massive rural-urban migration, huge debts, over-expenditure on arms, environmental degradation and unsustainable development patterns. While many developing countries such as India, Thailand, China and Malaysia have for long had national development plans to address some of these issues, in the past they tended to be too top-down and not human-centered enough. The mindset was much influenced by export-led growth based upon the Gross Domestic Product, without adequate attention to policies of equity/ social justice such as income distribution and land re-allocations. In this regard, the annual Human Development Program illustrates a very varied panoply in Asia, ranging from some of the world's poorest (and least liberal) countries such as Afghanistan and Burma to the better economically endowed countries such as Singapore and Brunei.

Even in the poorest settings, good practices can be identified if there is the political and social will to cater to development needs and human rights. For instance,

Bangladesh has the Grameen bank which provides small loans to women, and it has been found that they are very responsible in paying back the loans. In Thailand, the Forum of the Poor has been instrumental in representing the demands of the poor, including those displaced by dams, and in ensuring improved compensation for them. Public hearings have also emerged as a way of sharing information and examining options before decisions are taken affecting people's development. In the Philippines, there is a very strong NGO lobby dealing with general development and human rights matters and specific issues such as street children and providing a voice for the poor, the dispossessed and the marginalized. In India, there is a parallel experience with strong advocacy against the construction of massive dams, such as those concerning the Narmada river, which cause massive displacements of people. There are active grassroots movements representing vulnerable groups including those affected by the caste system, such as the *Dalit*. However, in authoritarian countries, independent NGOs are not allowed to exist or are very closely monitored by the authorities.

On another front, many Asian countries have failed to accede to the International Covenant on Economic, Social and Cultural Rights which could otherwise provide guidance for a more rights based approach leading to responsive laws, policies, programs, practices, mechanisms and resources. Given the fact that the majority of people in Asia are still in rural areas, the challenge is much related to rural development and the shift to urbanization with massive migrations of people and the ensuing pressures. In many countries, this is linked with the fact that wealth, including land, is in the hands of a few who are often linked with the urban elite. There are few policies of equity to redistribute such wealth, while social safety nets such as state-based social security are often missing or merely nascent.

Interestingly, in principle, Asian countries are agreeable to the 1986 (United Nations) Declaration on the Right to Development which calls for not only

external restructuring but also international restructuring to respond to the human face of development. However, few countries manage to fulfill the aspirations of this Declaration which posits a comprehensive approach and is based upon the totality of civil, political, economic, social and cultural rights and reinforced by the precept of equity embedded in the following stipulation in Article 8:

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

Not only is there lax implementation at the national level in many countries. There is also a distortion by some countries which prefer to emphasize the economic, social and cultural aspects of development to the neglect or omission of the civil and political aspects - in other words, development without genuine people's participation leading to a democratic system.

From the angle of vulnerable, disadvantaged and marginalized groups, there is often a paradox: while progress has been made on some fronts, there are numerous lapses in practice. Progress is seen in particular through the introduction in many countries of new laws and policies with positive impact against human rights violations, e.g., laws against human trafficking. More law enforcers are being trained on human rights. In the Philippines, there is even the condition that military officers will not be upgraded in



rank unless they have done a course on human rights. Investigations by various bodies ranging from national human rights commissions to the judiciary on a variety of issues ranging from extra-judicial killings to environmental harm have led to greater accountability from the perpetrators in such countries as Indonesia and India. However, the other side of the coin is that many systems suffer from weak law and policy enforcement and are replete with corruption and cronyism. This is further plagued by undemocratic regimes, armed conflicts, lack of good governance and unsustainable development patterns.

There are other key issues/groups which are crucial for Asia today, including the following:

1. *Women's rights.* A greater number of countries are now becoming parties to the 1979 Convention on the Elimination of All Forms of Discrimination against Women. For example, in the 10-member country ASEAN, all but one country have acceded thereto. Many countries have improved their laws to overcome discrimination and violence against women. However, in addition to the dilemma of lack of effective implementation, transgressions persist. These range from negative cultural practices such as the sale of women into sexual slavery to more modern forms of cross-border trafficking and violence. Discrimination against women is found in variety of fields ranging from family and succession to education, health care, anti-poverty measures and involvement in economic, social and political life. In many countries, access to decision-making positions including politics is very limited.
2. *Child rights.* As noted earlier, the CRC is the sole human rights treaty to which all Asian countries have acceded. There have been many positive law and policy improvements in recent years in
3. *Those with disabilities.* Some countries have moved towards new laws and policies to assist this group. Countries with good state welfare systems are more likely to have direct facilities for this group, but few Asian countries are in this position. Problems vary from discrimination in the form of lack of access to education, employment and health care to too much institutionalization without adequate support facilities. There is thus lack of 'inclusion' in many countries of those with disabilities in a humane setting.
4. *Refugees.* Asia is home to millions of refugees who cross borders in search of asylum, and has largely provided commendable refuge to them. Yet, few Asian countries have acceded to the 1951 Convention relating the Status of Refugees and its 1967 Protocol. Many Asian countries also cause the massive flight of this group through persecution, warfare and human rights violations. While prevention is key, the components of prevention, including respect for

human rights, peace and democracy have not been fostered adequately in many settings. During flight, refugees are also subjected at times to pushbacks and deportations which endanger their lives. Upon arrival in the country of refuge, while they may enjoy temporary refuge, their access to the basics of life such as health care, education and employment is limited. In their search for long-term solutions, their options are often limited. Many countries where they seek refuge refuse to let them settle there permanently, while third countries are also reluctant to let them resettle. While voluntary repatriation to the country of origin is at times a potential maximum solution, this is not possible because the political conditions in the country of origin are not forthcoming. Precisely because they are often in a limbo status, they often find themselves discriminated against as stateless persons.

5. *Internally Displaced Persons.* This group has come increasingly to the fore in recent years and differs from refugees in that they have not crossed borders. They may be displaced for a variety of reasons. In Asia, these range from extreme poverty to armed conflict and development-induced factors, such as dam construction, but often, it is warfare that pushes them to leave. While the international community has moved towards guidelines for their protection and assistance, their plight in practice is often precarious and, unlike refugees, the international regime for their protection is limited in scope. There is no treaty that specifically guarantees their rights, except general human rights treaties. At the national level, the challenge is to respond to the call to prevent the conditions leading to their displacement (these interrelate with sustainable development, human rights,

democracy and peace) as well as provide protection when they are displaced.

6. *Workers/Migrant.* Millions of workers/migrants are on the move in Asia whether within countries or across borders. While most countries have labor laws and policies that can accord them some protection, the situation is more complex when they enter a country illegally. This may also be due to human trafficking, whereby criminal elements ply their trade of profiteering from people who are searching for employment. In cross border cases, undocumented migrants are often classified as "illegal immigrants" subject to deportation without adequate guarantees for their safety. If they manage to work in the country to which they migrate, they are also endangered by discrimination, abuse and exploitation ranging from low pay to lack of welfare. Whether or not they are documented, they should enjoy basic rights, but the fact is that most countries have not responded to these rights effectively, and they have not acceded to the main international instrument on the subject, namely, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

7. *The Elderly.* Traditionally, in Asia, it was the extended family which took care of the elderly. However, family patterns are changing, especially with continuing migration from rural to urban areas and families are becoming more nuclear. Traditional social safety nets offered by the extended family are thus in decline. This raises a question not yet adequately answered by many countries. Will the State step in to help the elderly as part of social security? What is the role of personal social insurance in preparing for one's old age? What should be the contribution



of the private sector? These are emerging issues which will need more attention from Asia in the future, granted that the region should also try to support and sustain the family and the community as the essence of traditional social safety nets.

8. *Prisoners and the Administration of Justice.* This heading involves not only political prisoners, who are sadly rampant in many undemocratic countries, but also the other prisoners who are affected by deficient justice systems. While guidance on this issue is offered, particularly by the International Covenant on Civil and Political Rights and related instruments, many Asian countries have failed to accede to these instruments. While there have been some improvements in recent years, such as reforms of the juvenile justice in some countries, problems persist. These range from the use of capital and corporal punishment to the employment of leg chains, inhumane detention facilities, torture and lack of access to a fair trial. Political prisoners are particularly affected by national Constitutions which serve the elite rather than the people, repression in the form of lack of basic freedoms such as the right to freedom of expression and assembly, and the pervasiveness of draconian national security laws which are used by governments to curb opposition, such as through preventive detention. The judiciary is also controlled in some countries by the ruling elite and there is no real independence. Some governments have also manipulated the judiciary to impose exorbitant fines on those opposed to their regimes as a way of suppressing political opponents. The challenge is very much linked to lack of democracy and good governance.

9. *Minorities and Indigenous Peoples.* Most countries would claim that they provide for the rights of minorities and indigenous peoples in their systems. However, the practice is often deficient, with rampant discrimination against these groups. Negative practices include lack of access to education, nationality and welfare and inadequate attention to their cultural aspirations such as the preservation of their languages and religions. There is also an unsettled issue concerning their aspirations in terms of political participation and self-determination. Precisely because these are not responded to adequately, several wars in Asia and elsewhere relate to conflicts between these groups and other groups. In terms of accession to international treaties on this subject, several Asian countries have yet to accede to the Covenants mentioned above. There is also limited ratification of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.

10. *Those with HIV/AIDS.* The advent of HIV/AIDS has posed critical challenges to Asia in recent years, with one of the faster rates of growth globally. On the constructive front, some Asian countries have been at the forefront of humane policies towards those with HIV/AIDS. These include the involvement of the business sector in promoting humane policies for those in the workplace. However, other countries are still responding in a less than human manner by segregating those with HIV/AIDS, forcibly testing persons for HIV/AIDS, and various forms of discrimination and stigmatization. While the international standards related to the instruments above are clearly in favor of non-discrimination and humane treatment of those with the disease, there is much more room for

responsive laws, policies and practices in the region.

11. *Civil Society, including NGOs, human rights defenders, the media and the business sector.* The important role of civil society in human rights promotion and protection cannot be underestimated in the region. At best, they are key partners with governments in helping to implement human rights. However, often they find themselves in conflict with governments in trying to protect the rights of others, and, and in so doing, their own rights are often jeopardized. Their voices have found the need for more coordination and networking among themselves as a force to counter the malpractices of governments and other power groups. While many members of civil society manage to function quite effectively under such stress, others find themselves oppressed and suppressed by undemocratic regimes and those antithetical to human rights.

#### Directions

The above scenario paints an ambivalent picture for Asia. From the perspective of progress, many positive developments have been noted, including the advent of more national human rights action plans, more national human rights institutions, more human rights education, and more laws and policies concerning development issue. Yet, the negative side is all too evident from the analysis above.

With the advent of the new millennium, there are various key directions for the region which should enhance the perspective of more humane society in Asia. These include the following priorities as a pivotal Agenda of preferred practices for all countries:

- Accession to international human rights instruments and effective implementation;

- Withdrawal of reservations to international human rights instruments;
- Democratization and multi-party system;
- People-based national Constitution and constitutional process;
- Reform of national security laws to reflect human security;
- Elimination of preventive detention and promotion of due process of law consistent with international standards;
- Promotion of freedom of expression, assembly, religion and thought;
- Accountability of public officials and an end to impunity;
- Promotion of independent and transparent judiciary and other modes of dispute settlement accessible and affordable to the people;
- Eradication of poverty and concretization of equitable policies to distribute land and other resources;
- Development of safety nets, such as social security for those in need;
- Respect for the rights of vulnerable groups including women, children, those with disabilities, workers/migrants, refugees, internally displaced persons, prisoners, minorities/indigenous peoples, the elderly, those with HIV/AIDS and members of civil society;
- Improvement of the justice system and humane treatment of suspects, prisoners and detainees;
- Capacity-building of law enforcers to promote integrity and counter corruption;
- Promotion of community and civil society participation;
- Elimination of capital and corporal punishment and other inhumane practices;



- Eradication of negative cultural practices, especially through a wider mobilization campaign;
- Protection of the environment;
- Promotion of human rights education and peace studies;
- Implementation of sustainable development activities;
- Conflict prevention and resolution and activities, such as youth programs, to foster cross-cultural understanding between different ethnic groups;
- Dissemination of human rights to a broad public, including power groups such as government officials, politicians, religious leaders and the business sector;
- Enhancement of local, national, sub-regional and regional capacities, programs and interchanges for the promotion and protection of human rights;
- Identification of and support for good practices and case profiles for human rights, peace, democracy, sustainable development and good governance, promotion of integrated actions on these issues, and elimination of malpractices.

## References

- Highlights of the Workshop on the Development of National Plans of Action for the Promotion and Protection of Human Rights in the Asia-Pacific Region, Bangkok, July 1999.
- Highlights of the Workshop on National Plans of Action for Human Rights Education in the Asia-Pacific Region, Tokyo, January 2000.
- Highlights of the Workshop on Economic, Social and Cultural Rights and the Right to Development in the Asia-Pacific Region, Sonag, February 2000.

Highlights of the 8<sup>th</sup> Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region, Beijing, March 2000.

UN Decade for Human Rights Education 1995-2004.

UN Guidelines for National Plans of Action for Human Rights Education.

Vienna Declaration and Programme of Action.

World Report 2000 of Human Rights Watch.

1997 Asian Human Rights Charter.

1996 International Covenants on Civil and Political Rights and Protocol.

1996 International Covenant on Economic, Social and Cultural Rights and Protocol.

1993 Bangkok Declaration (on Human Rights).

1993 Bangkok NGO Declaration on Human Rights.

1989 Convention on the Rights of the Child.

1986 UN Declaration on the Right to Development.



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## HUMAN RIGHTS IN ISLAM: A General Observation

Nasser A. Marhomisalic

One Muslim thinker notes that, in its comprehensive form, freedom does not lend itself to a definition,<sup>1</sup> for it springs from man's sublime aptitudes and inclinations. When it is exercised towards the development of man, freedom becomes a human right.<sup>2</sup> Otherwise, it takes the form of crime or sin.

### Freedom, Rights and Duties

Islamic thought considers freedom as the base of rights and duties<sup>3</sup> and that rights and duties are interrelated and the enactment of one necessitates the provision of the other.<sup>4</sup> In its popular significations, the term "rights" relates to reservations and privileges granted to individual or groups of persons while the term "duties" refers to obligations prescribed for others not to transgress or violate said reservations or privileges.<sup>5</sup> Writes Seyed Waheed Aktaf:

*The relation between rights and freedom is twofold. On the one hand no right can be conceived without freedom, on the other, rights and duties are also related to each other reciprocally. Every right granted to man saddles him with corresponding duties, and each duty fulfilled by man secures some rights of others, which in its own turn results in securing a safer ground for enjoying and exercising one's own rights. Freedom of man implies that all men have equal right to freedom, which leads to a logical corollary that every individual's freedom is delimited by others' freedom. But this limitation does not deprive one of his freedom, rather it safeguards freedom of all men. If one is allowed to exercise his individual freedom to an extent which results in grabbing or curtailing other men's freedom*

*, nobody can remain free, and freedom itself will become meaningless. Thus freedom in itself is a right as well as a duty... Usually rights are supposed to precede duties. It is really very difficult to solve the riddle as to which is prior between these two. In actuality freedom, right and duty (or obligation) are three sides of a triangle, in which all three sides are equal. In this triangle I personally prefer to regard freedom as the base. However, all three sides are equally essential to form a triangle. If any one of the three is eliminated the triangle disappears. Islam has given equal importance to all the three, which together form the moral, social and political conduct of a Muslim.<sup>6</sup>*

### Divine Commandments

In Islam, human rights are granted and sanctioned by God and are an integral part of faith.<sup>7</sup> They are binding divine commandments and their observance is an act of worship and their neglect or violation an abominable sin.<sup>8</sup> The Qur'an prescribes penalties for some violations of human rights or for five (or six?) sort of crimes, namely: murder, theft, adultery, calumnious accusation of adultery, offenses against public security and (sodomy?)<sup>9</sup> For offenses whose punishment is not determined, Islam mandates the legislation of a retributive system of justice.<sup>10</sup>

### Basic Human Rights

What then are these human rights?

Mawdudi, one of the chief architects of contemporary Islamic resurgence, listed down the following basic human rights: Right to life; right to the safety of life; respect for the chastity of women; right to a basic standard of life; individual's right to freedom; right to justice; equality of human beings; and the right to cooperate and not to cooperate.<sup>11</sup>

### Rights of Citizens

Also, Mawdudi listed down the following rights of citizens in an Islamic State: Security of life and property; protection of honor; sanctity and security of private life; security of personal freedom; right to respect against

\* Speech delivered during the Consultative Meeting on Human Rights in Muslim Communities on March 22-23, 1999 at the Mindanao State University, Marawi City.



tyranny; freedom of expression; freedom of association; freedom of conscience and conviction; protection of religious sentiments; protection from arbitrary imprisonment; right to basic necessities of life; equality before the law; rulers are not above the law; right to avoid sin; and the right to participate in the affairs of the state.<sup>12</sup>

#### *Rights of Enemies in War*

Further, Mawdudi made an outline of the rights of enemies in war recognized in Islam, as follows: Respect for the rights of non-combatants and those in places of worship; prohibition against the burning alive and torture of adversary; protection of the wounded, the prisoners and the harmless; no looting and destruction in the enemy's country; sanctity of property of the general public of conquered country; sanctity of a dead body; return of corpses of the enemy; prohibition of breach of treaties; and declaration of war before opening hostilities.<sup>13</sup>

#### *Rights of Religious Minorities*

In an Islamic State, a non-Muslim enjoys all social and political rights and is accorded the freedom to do what his religion bids him to. As explained Dr. Seyed Jawad Mustafavi:

*As long as the non-Muslim does not wage war against the Muslims, he can live in the Muslim country freely and equally like a Muslim and he can enjoy all social and political rights. He is free to perform his own religious rituals even though they are against Islam such as taking a holiday other than Fridays, worshipping in synagogues, churches, convents, and monasteries by trinitarianism, baptism and any other programmes and practices that they have in their religious rites, even wine-drinking, gambling, and eating pork. They are allowed to this as long as these actions do not weaken the beliefs and freedom of the Muslims. Anything that is, by the assessment of a Muslim jurisprudent, considered as violating the beliefs and freedom of Muslims will not be permitted to be done openly.<sup>14</sup>*

#### **1990 Cairo Declaration**

In 1990, Member States of the Organization of the Islamic Conference converged in Cairo and drew a document entitled "Cairo Declaration on Human Rights in Islam," defining principles of human rights in Islam. These rights include the following: Equality in dignity and rights; rights to life and genocidal annihilation; humanitarian treatment and protection of non-belligerents, the wounded, the sick and the prisoners; protection of civilian properties and the environment; protection of honor; right to marry and found a family; equality between man and woman in human dignity; right of women to own civil identity, to financial independence and to retain her name and lineage; rights of children including the fetus due from parents, society and the state such as the rights to nursing, education material, hygienic and moral care; right to recognition as a person before the law everywhere where his capacity is not impaired or lost and the right to be represented by guardian; right to education and to share in scientific advancement; freedom to change religion; freedom from colonialism and slavery; freedom of movement; right to domicile; right to privacy; right to work under conditions of safety and security and other social guarantees and rules of equity; right to legitimate gains without monopolization, deceit or harm to oneself or to others and freedom from usury; right to ownership; right to enjoy the fruits of one's scientific, literary, artistic or technical production; right to live in security; equality before the law without distinction between the ruler and the ruled; right to resort to justice; right of defendant to counsel, presumption of innocence, and a fair trial; freedom from arbitrary arrest, detention or exile; right to asylum; prohibition of physical or psychological torture or any form of humiliation or cruelty or indignity on arrested and detained person; right of an individual against the use of his human body or any parts thereof to medical or scientific experimentation without his consent; prohibition against taking hostages under any form; right to express opinion and give information



which do not violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith or arouse nationalistic or doctrinal hatred or incite social discrimination; and the right to participate, directly or directly, in government.<sup>15</sup>

### Universality of Human Rights

Generally, these rights concord with those mentioned in the Universal Declaration of Human Rights. There are areas of conflict, however, between these documents.

Unlike the Universal declaration of Human Rights, the right to freedom of peaceful assembly and association is not regulated in the Cairo Declaration. This is understandable. It may well be said that this is the result of the lobby of influential Member States of the Organization of the Islamic Conference which are ruled by dynastic and dictatorial regimes. In books and exegesis by learned Muslims on the Qur'an and the Sunnah of Prophet Muhammed, may peace be upon him, this right to peaceful assembly and association is a basic and fundamental human right.

Prohibition of usury is defined in the Cairo Declaration<sup>16</sup> but not in the United Nations document.

On the right to marriage, the two documents clash. The Universal Declaration of Human Rights provides that "Men and Women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family."<sup>17</sup> In the enumeration of those facts of social life which should not be considered as a bar to the enjoyment of the right to marriage, the Cairo Declaration does not mention religion.<sup>18</sup> For Islam forbids intermarriage.<sup>19</sup>

It may be argued, however, that these documents do not differ in this area of human rights. In the first place, the Universal Declaration of Human Rights acknowledges freedom of religion as a fundamental human right. So that when one chooses his religion, he subjects himself to the injunctions of that religion. Hence, the dignity of an individual is not diminished or one's

freedom is not lost if he conducts himself and his relationship according to or by the injunction of his religion.

As regards the right to education, the Universal Declaration of Human Rights only prescribes free education in the elementary and fundamental stages.<sup>20</sup> But in Islam, the state or the society is encumbered to provide its constituents free education from cradle to the grave.<sup>21</sup> In the words of the Cairo Declaration, thus:

*The question of knowledge is an obligation and the provision of education is a duty for society and the state.<sup>22</sup>*

As in the other great religions of the world, Islam accords man rights to sail him through life, from his existence in the womb to his death and even after his death. Islam protects the life of a fetus by criminalizing unjustified abortion.<sup>23</sup> Islam too prohibits the flouting of the memory of the dead. The Cairo Declaration provides, thus:

*Every human being is entitled to inviolability and the protection of his good name and honour during his life and after his death. The state and society shall protect his remains and burial place.<sup>24</sup>*

### Primacy of Human Rights

Muslims are wont to argue that the teachings of Islam on human rights are superior over those obtaining in the West. Be that as it may, they bear the pride that Islam is the Historical progenitor of developments on human rights. Notes Mawdudi:

*The West had no concept of human civic rights before the seventh century; and it was not until the end of the eighteenth century that the concept took on practical meaning in the constitutions of America and France.<sup>25</sup>*

The first Western document on human rights was the Magna Carta of 1215 of Great Britain which was drawn up 600 years after the advent of Islam.<sup>26</sup> Since



then, human rights as a social institution has evolved in the West through their legislatures and parliaments. They have dressed it up to primacy in their legal infrastructure on human rights into the United Nations. But the Muslim world, despite incorporation to the larger world body, has pursued its own human rights agenda in the light of Islam, not to mention the interests of some of its governments and ruling aristocracy or oligarchy who defy and defile Qur'anic teachings on human rights.

To emphasize, human rights are conferred by God and no individual and no institution has the authority to withdraw them.<sup>27</sup> The Cairo Declaration states:

*No one as a matter of principle has the right to suspend them in whole or in part or violate or ignore them in as much as they are divine commandments.*<sup>28</sup>

## Endnotes

<sup>1</sup> Zanzani, Hujjatul-Islam Abbas Ali Amid, "Right of Participation in the Fate of People and in the Makeup Socio-political System". In Sayyid Khadim Husayn Nagavi, ed. *Human Rights in Islam*, Islamic Propagation Organization, Teheran, Islamic Republic of Iran, p. 73.

<sup>2</sup> *Ibid.*, p. 75.

<sup>3</sup> Akhtar, Dr. Seyed Waheed, "Freedom in the Islamic Framework of Human Rights with Special Reference to Nahj al-Balaghah". In Sayyid Khadim Husayn Nagavi, ed. *Human Rights in Islam*, Islamic Propagation Organization, Teheran, Islamic Republic of Iran, 1989, p. 392.

<sup>4</sup> Yazdi, Hujjatul-Islam Muhammad Taqi Mubash, "The Origin of Rights" In Sayyid Khadim Husayn Nagavi, ed. *Human Rights in Islam*, Islamic Propagation Organization, Teheran, Islamic Republic of Iran, 1989, p. 142.

<sup>5</sup> *Ibid.*, p. 142.

<sup>6</sup> Akhtar, Dr. Seyed Waheed, pp. 391-392.

<sup>7</sup> Mawdudi, Abul A'la, "Human Rights in Islam", 1980, London: Islamic Foundation, pp. 15-16.

<sup>8</sup> Preamble of the 1990 Cairo Declaration on Human Rights in Islam.

## SOURCE BOOK ON HUMAN RIGHTS

<sup>9</sup> Summary of the Proceedings of the Conference of Riyadh on Moslem Doctrine and Human Rights held in Riyadh beginning March 23, 1972. In Conferences of Riyadh, Paris, Vatican City, Geneva and Strasbourg on Moslem Doctrine and Human Rights in Islam, published by the Ministry of Justice, Riyadh, and Dar Al Kitab Allubani, Beirut, p. 24.

<sup>10</sup> *Ibid.*, Tabbarah, Afif A. "The Spirit of Islam" 1978, Beirut, pp. 376-395.

<sup>11</sup> Mawdudi, Abul A'la, 1980, pp. 17-22.

<sup>12</sup> *Ibid.*, pp. 23-34.

<sup>13</sup> *Ibid.*, pp. 35-39.

<sup>14</sup> Mustafavi, Dr. Seyed Jawad, "Human Rights in Islam" In Sayyid Khadim Husayn Nagavi, ed. *Human Rights in Islam*, Islamic Propagation Organization, Teheran, Islamic Republic of Iran, 1989, pp. 188-189.

<sup>15</sup> See the 1990 Cairo Declaration on Human Rights in Islam.

<sup>16</sup> Article 14, 1990 Cairo Declaration on Human Rights in Islam.

<sup>17</sup> Article 16, the Universal Declaration of Human Rights.

<sup>18</sup> Article 5, 1990 Cairo Declaration on Human Rights in Islam.

<sup>19</sup> Text of a Memorandum Submitted by the Kingdom of Saudi Arabia to International Organizations on Human Rights and their Implementation within its Territory In Conferences on Moslem Doctrine and Human Rights in Islam, pp. 51-55.

<sup>20</sup> Article 26, Universal Declaration of Human Rights.

<sup>21</sup> Text of a Memorandum... p. 48; Cultural Rights of Man in Islam. In Conferences on Moslem Doctrine and Human Rights in Islam, pp. 107-111; Tahir Saifi Al-Mue qabi, "The Political Rights in Islam: The Mutual Rights between the Ummah and the Imam" In Sayyid Khadim Husayn Nagavi, 1989, pp. 136-137.

<sup>22</sup> Article 9, 1990 Cairo Declaration on Human Rights in Islam.

<sup>23</sup> Mustafavi, Dr. Seyed Jawad, p. 178.

## Selected Issues and Debates on Human Rights

<sup>24</sup> Article 4, 1990 Cairo Declaration on Human Rights in Islam.

<sup>25</sup> Mawdudi, Abu A'la, 1980, p. 15.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Preamble of the 1990 Cairo Declaration on Human Rights in Islam.

## References

Akhtar, Dr. Seyed Waheed (1989) "Freedom in the Islamic Framework of Human Rights with Special Reference to Nahj al-Balaghah" In Sayyid Khadim Husayn Nagavi (ed) *Human Rights in Islam*, Teheran, Islamic Republic of Iran: Islamic Propagation Organization.

Mawdudi, Abul A'la (1980) *Human Rights in Islam*, London: Islamic Foundation.

Mustafavi, Dr. Seyed Jawad (1989) "Human Rights in Islam" in Sayyid Khadim Husayn Nagavi (ed) *Human Rights in Islam*, Teheran, Islamic Republic of Iran: Islamic Propagation Organization.

Yezdi, Hujjatul-Islam Muhammad Taqi Mubash (1989) "The Origin of Rights" In Sayyid Khadim Husayn Nagavi (ed) *Human Rights in Islam*, Teheran, Islamic Republic of Iran: Islamic Propagation Organization.

Zanzani, Hujjatul-Islam Abbas Ali Amid (1989) "Right of Participation in the Fate of People and in the Makeup Socio-political System" In Sayyid Khadim Husayn Nagavi (ed) *Human Rights in Islam*, Teheran, Islamic Republic of Iran: Islamic Propagation Organization.

Preamble of the 1990 Cairo Declaration on Human Rights in Islam.

Summary of Proceedings of the Conference of Riyadh on Moslem Doctrine and Human Rights held in Riyadh beginning March 23, 1972. In *Conferences of Riyadh*, Paris, Vatican City, Geneva and Strasbourg on Moslem Doctrine and Human Rights in Islam, published by the Ministry of Justice, Riyadh, and Dar Al Kitab Al-Ibnani, Beirut.

Text of a Memorandum... p. 48; Cultural Rights of Man in Islam. In *Conferences on Moslem Doctrine and Human Rights in Islam*, pp. 107-111; Tahir Salih Al-Mue gabi, "The Political Rights in Islam: The Mutual Rights between the Ummah and the Imam". In Sayyid Khadim Husayn Nagavi, (ed) *Human Rights in Islam*, Teheran, Islamic Republic of Iran: Islamic Propagation Organization, 1989.

## SOURCE BOOK ON HUMAN RIGHTS

134

Text of a Memorandum Submitted by the Kingdom of Saudi Arabia to International Organizations on Human Rights and their Implementation within Its Territory In *Conferences on Moslem Doctrine and Human Rights in Islam*.



## NASSER A. MAROHOMASALIC

Marohomasalic finished law at the College of Law of the University of the Philippines in 1981 and passed the Bar on the same year. Joining the protest movement against martial law while engaged in private law practice, Marohomasalic co-founded, with former senator Raul S. Manglapus, the National Union of Christian Democrats-Union of Muslim Democrats of the Philippines (now Christian-Muslim Democratic Party), where he served as Ex-Officio Member of its Executive Committee as well as Deputy Legal Counsel and Acting Chief Legal Counsel. After the 1986 People Power uprising, he joined government in various capacities, notably, as Special Assistant to Foreign Affairs Secretary Raul S. Manglapus (1989-1992), Commissioner at-large of the Regional Consultative Commission for Muslim Mindanao (1988) and Commissioner of the Commission on Human Rights (1994-2001).

In 1991, Marohomasalic wrote a book, "Aristocrats of the Malay Race: A History of the Bangsa Moro in the Philippines", under a grant from Mindanao State University and the Ramos Peace and Development Foundation. In commemoration of the 50<sup>th</sup> Anniversary of the Universal Declaration of Human Rights in 1999, the Department of Foreign Affairs published a collection of his speeches under the title, "Towards Peace, Autonomy and Human Rights." Marohomasalic has also written several articles in journals, books, magazines and the opinion pages of national dailies.

## Selected Issues and Debates on Human Rights

135



PHILOSOPHY OF HUMAN RIGHTS AND  
EMERGING PERSPECTIVES: WESTERN VERSUS  
THE EASTERN CONCEPT-THE ASEAN SCENARIO\*

Sedfrey Candalaria

I would like to begin by starting first how I am going to proceed with my discussion. When the topic was given to me, it challenged me a lot. It's an issue that, to this date, confronts the region – not just ASEAN but Asia as a whole. And the fact that Asia, at this point, has not come up with a regional human rights protection mechanism makes it more important to really look at this issue.

The lecture is on the western concept of human rights as against the eastern concept. At the outset, I would like to say that I hope we could reconcile the two. I will make my own observation on this point at the latter part of this lecture. In practice, we will see that there may be some reconciliatory points between the two concepts. However, as we examine the instruments and proceed into the formal analysis of the two concepts of human rights, we will see that there are a number of differences that need to be acknowledged. And yet, certain conditions in Asia, and particularly in ASEAN, seem to challenge the proponents of an extremist perspective of the eastern concept of human rights in our region.

I will discuss briefly the history of the development of human rights protection mechanisms at the international level, with some historical accounts on the evolution of human rights. I will also look into the contribution of some of the ancient religions prevalent in the region to the development of the modern concept of human rights. Then, I will proceed to another section

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that will tackle some emerging perspectives on human rights in our region. We may not have time to go into the whole of Asia. Nevertheless, I think it is public knowledge that, in the region, there are multilateral issues which may not be commonly shared with the West because of the stages of economic development within the region and, in particular, the cultural composition of the Asian peoples.

In the next section, I will try to discuss some ideas and challenges to the traditional or western concept of human rights, citing some factors and issues that have affected Asia which, somehow, influence us in the way we approach the concept of human rights both at the domestic and the international level. Then, I shall briefly look into the policies and practices in the ASEAN and, hopefully, give examples of some policy statements made by some ASEAN members who have been most passionate in trying to propose a re-examination or, in fact, sometimes a rejection, of the Universal Declaration of Human Rights.

Finally, I will try to sum up the issues that may concern us as a result of ideas propounded by some of our neighboring countries in the ASEAN and make some counter-arguments on the basis of the readings I have done, including my interaction with some people in the various conferences which I have attended concerning the issue within the region. I shall reserve my conclusion later on.

Now, the purpose of this study is to primarily revisit the current debate concerning the universality of human rights norms. The issue was articulated most prominently by a number of Asian delegates, particularly during the Second United Nations Conference on Human Rights held in Vienna in June, 1993. Since then, several commentators and legal scholars on human rights have contributed to the discourse which, to this date, continues to build up in the light of the 50<sup>th</sup> anniversary of the 1948 Universal Declaration of Human Rights. In terms of relevance to specific regional concerns, the clarification of the ultimate issues surrounding the debate could

hopefully assist the policy-makers in the region and also in the Philippines, including practitioners in the field of human rights, on how to approach current and future events within the ASEAN region. It is also to be noted that the discussion on Asian values comes at a time when new political developments in the ASEAN have started to test the objective foundation of this so-called Asian values.

Historically, the legal concept of human rights at the international level, as formalized in the United Nations instruments, has been largely influenced by Western States. While these formal instruments indicate a set of norms comprising civil, political, economic, social and cultural rights, it has become evident in state practice that Western States tend to emphasize the individual civil and political rights. Often, too, the advocacy for human rights by these states is coupled with the promotion of democratic and libertarian principles in institutions. This thrust somehow explains the dichotomized view of human rights as exemplified by the story behind the ideological development of the human rights instruments in the post World War II era. For instance, it has been explained by some writers that the adoption of two basic human rights instruments, i.e., the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, may be traced to the Cold War era which divided the world community between the socialist bloc countries led by Russia and China, and the non-socialist countries. The socialist states argued in favor of the primacy of the promotion of economic, social and cultural rights over civil and political rights, challenging the traditional view advocated by most non-socialist states such as the United States, United Kingdom, and other Western European countries. In terms of the moral foundation of the human rights and freedoms found in the international instrument, there is a shared view by some writers that the culture of ancient Eastern civilization dominated by some of the world's oldest religions such as Confucianism, Buddhism, Hinduism and also Islam, also

reveals practices and values similar to those found in the Universal Declaration of Human Rights.

I think many of us have, at one point in time, come across the Universal Declaration of Human Rights. At this stage, I would like to present to you a cursory examination of some of the ancient religions in the region. We shall see that Confucianism, Buddhism, Hinduism and Islam, which are some of the most dominant religions in the region, contain several precepts reflective of the Universal Declaration of Human Rights. There are writers, however, who have also pointed out the marked differences between some religious tenets and the Universal Declaration of Human Rights.

Allow me to go quickly through some of these issues. In the case of Hinduism, there is much criticism by some writers as regards its content *per se*. For instance, they argue that Hinduism continues to endorse the practice of the caste system. That is one point of contention concerning the Hindu practice and, according to some writers, this is really an affront to the individual dignity under Art. 1 of the Universal Declaration of Human Rights. It also somehow impinges on the right to recognition of the person and also on his freedom of opinion. In fact, some of the writers in the field, particularly the pro-Western advocates, have pointed to the fact that Indian society is highly stratified or hierarchical, and this is seen as preventing participation of certain groups of people within the society.

According to other writers, however, we can see that despite the existing practices in Hinduism, there is actually an implied acceptance of the freedom of religion.

In the case of Buddhism, commentators have actually emphasized that the basic tenet of Buddhism is non-violence, non-hatred, service, compassion, friendliness and personal morality. This is important because in the case of Confucianism, which actually abhors the issue of profit-motive, we will see that some of these elements are antithetical to the existence of some practices of some states that purport to actually promote Buddhism or Confucianism.



In Buddhism, there is strong emphasis on the concept of equality of all human beings. Writers say this is very much an affirmation of the promotion of the dignity and equality of the person at the international level.

Now, in the case of Islam, there is a very interesting quote on the concept of equality of persons that has become very popular, among others. And I would like to read this because it has been a much used quotation in the writings that I have encountered on this subject. It says here that while the prophet Mohammed was delivering his farewell sermon at Mecca, he uttered the following:

*Oh, Mankind! The Arab is not superior to the non-Arab nor vice-versa. The white has no superiority over the black, nor vice-versa. And the rich has no superiority over the poor. All of you are Adam's descendant and Adam was made of earth.*

If one will analyze this quote from the prophet, one will see that there is a very strong emphasis on the redistribution of wealth within society. It is very social justice-oriented while at the same time affirming the equality of individuals.

In the case of Confucianism, some writers have emphasized the aspect of a set of relationships within the Confucian society. And some of these writers have emphasized that if one looks at the structure of the Confucian society, it follows a very hierarchical system. One discovers the key relationships called the ruler-subject, father-son, husband-wife, elder brother-younger brother, and friend-friend. Included also are the four social classes - the scholars, the farmers, the soldiers, and the merchants. One observes that there is an emphasis on the role, and the protection of one's assumption of his or her own role is actually a test of one's duty in society. There is much emphasis on the duty to the community and the assumption of one's function in accordance with the way the Confucian tenets demand of every individual.

Now, while I have presented some of the elements that may actually be shared by some of the ancient religions with the Universal Declaration of Human Rights, I will point out later that some of the emerging perspectives in the Asian context, however, may not actually reflect the actual practice. According to some writers, the purity sometimes of the tenets have somehow been colored by the expediency in the practice of some of these states, and oftentimes also by the dictates of the economic development priorities. There were also some who have expressed the view that the basis of the Universal Declaration of Human Rights, which is actually predominantly Western if one were to examine its provisions, and also Judeo-Christian in orientation, and the ancient religions are even diametrically opposed. Now, this is a very extremist view because if you take a look at and revisit the provisions of the Universal Declaration of Human Rights, and when you talk about values as translated into formal rights, many of the values that we can find in some of the ancient religions are also actually the moral foundations of the Universal Declaration of Human Rights.

The clarification of the moral basis of human rights helps facilitate the monitoring and enforcement of clearly defined rights. In this regard, the adoption of international human rights instruments stresses the view that every person should have rights within his or her society that the state should recognize, respect and ensure. This idea spawned general acceptance as expressed in the ratification and accession of states to these instruments - that how a state treats its citizens or a person within its territory with respect to his or her human rights is not the state's own business alone, and therefore exclusively within its domestic jurisdiction, but is also a matter of international concern and a proper subject for regulation by international law.

Now, the consensus or agreement on a set of human rights norms applied and monitored at a regional level has given birth to human rights protection mechanisms. Asia is perhaps the only region that has not really come



up with a consensus instrument. Even in Asia, we will find at least two or three sub-regional groupings. We may talk of a protection mechanism that is being proposed called the Draft Pacific Charter on Human Rights, which includes Australia, New Zealand and the other Pacific countries, or one may cite the South Asian countries – Sri Lanka, India, Pakistan, and their neighboring countries – where they have another set of instruments being proposed. Today, in ASEAN, there is a series of initiatives for the adoption of a human rights instrument both at the NGO level and, hopefully, in cooperation with the ASEAN governments, at the ASEAN level.

Let me move to some emerging perspectives within the context of Asia. When one speaks of Asia in comparison with the rest of the regions of the world, an interesting characteristic of the Asian region is the diversity of cultures, stages of economic development, and political ideologies. Asia is also marred by several armed conflicts, whether local or international in scope. Historically, the region has been colored with a colonial past which paved the way for the introduction of western ideas and institutions into local customs and practices. There are other Asian states, however, which have successfully repelled the influence of the West. In terms of human rights situation, the struggles of Asian peoples and communities may be described as varied in scope, as illustrated by the range of issues and sectors in the region. Let me present to you a range of issues that could be found within the region and culled from the proceedings of an NGO gathering in the course of the preparation for the Vienna Conference.

If one were to go through the issues, you will see that they are so varied – militarization, self-determination, disappearances, torture, authoritarianism, indigenous peoples and ancestral land rights, suppression of worker's rights, the informal sector, migrant workers, child trafficking and prostitution, refugees and internal displacement, corruption, discrimination against women, environmental

degradation, ethnic discord, agrarian reform, and religious extremism. These issues have somehow compelled the NGOs, and even governments for that matter, to actually re-examine the type of instrument that should at least be developed at the ASEAN level. Later on, there was a difference of opinion on how to approach this when the NGOs and the governments went to Vienna for the World Conference on Human Rights. I shall show some of the policy statements made by some of the ASEAN countries which are proposing Asian values. I would like to remind you, though, that if one were to go to the majority of the opinions and documents arising out of the Bangkok Proceeding, in preparation for the Asian participation to the World Conference, I would still like to think that the concept of Asian values tends to be a minority, especially if one were to talk of the marginalized groups within Asia. And, as we shall see, many of the proponents of the Asian values tend to be identified with the elite of the individual proponent states.

The attending social, cultural, political and economic conditions of Asia have determined, to a large extent, the attitude of Asian societies and governments towards the promotion and protection of human rights. Thus, it may be arguable to suggest that from the point of view of Asians today, conditions underlying the adoption of the Universal Declaration of Human Rights have radically changed such that a re-examination of the contents is now called for. As I said earlier, initiatives on a redefinition of the concept of human rights have been undertaken by various interest groups. But the debate has been carried out quite emphatically within the context of the newly industrializing states in East and Southeast Asia. It has been argued by known heads of states and governments within the sub-region that the acclaimed economic success of their countries, at least in the recent past, may be attributed to the application of their indigenous values rather than the adoption of Western-style theories on governance and political institutions. The approach towards the relationship



between these states and their citizens has also been based apparently on values not necessarily identical to those underlying the Universal Declaration of Human Rights which purported to be a set of minimum standards for all societies.

Let me now focus on ASEAN. As we know, ASEAN was created in 1967. It started off with five countries. Now, it is almost double. Cambodia is still applying, I understand, and there was a real dilemma on the Cambodian issue, particularly with regard to the *coup*. Myanmar, which was recently admitted, actually was an acid test for ASEAN. Related to this issue, I shall point out later to a policy statement made by no less than Deputy Minister (Anwar) Ibrahim of Malaysia who talked about the new concept of constructive intervention in the area of human rights.

ASEAN was created to further strengthen the existing bonds of regional solidarity and cooperation. It recognized that member states shared a primary responsibility of strengthening the economic and social stability of the region, of securing their peaceful and progressive national development, and of guaranteeing their stability and security from external interference in any form or manifestation in order to preserve their national identities in accordance with the ideas and aspirations of their peoples. The fundamental principles guiding ASEAN members with regard to the settlement of differences may be found in the Treaty of Amity and Cooperation signed in 1976. Among the principles that were enunciated here were the following: one is mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations and two, is that the right of every state to lead its national existence free from external interference, subversion, or coercion must be respected. There is also much emphasis on non-interference in internal affairs of another member of the ASEAN and the settlement of differences or disputes by peaceful means. Of course, it renounced the use of force.

Art. 10 of the Treaty of Amity prohibits any member state from participating in any activity which shall constitute a threat to the political and economic stability, sovereignty or territorial integrity of another high-contracting state. It has been observed by some critics that the diversity in socio-cultural backgrounds and the need to pursue economic development have become actually convenient reasons for several ASEAN states to justify what we call "soft-authoritarianism." This also has the effect of stifling dissent of its citizens to decision-making processes of the government. Effective military type of control, as evidenced by Internal Security Acts, and the stifling of press freedom exist in these authoritarian Asian societies. Accounts of human rights violations in ASEAN are not only limited to the authoritarian states but even include the open and democratic states like the Philippines and Thailand.

The proponents of Asian values in ASEAN are quick to admit that the Western model of human rights advocacy tends to sow division between citizens and their government and undermine economic gains which are crucial for the fullest enjoyment by the citizens of their human rights.

I have mentioned earlier that one of the obstacles to the establishment of a regional human rights mechanism in ASEAN is the lack of consensus on the normative framework for human rights. Despite this obstacle, various initiatives of the NGOs at inter-governmental levels have indicated signs of modest engagement by some ASEAN states on the issue.

I would just like to mention some of the key instruments that have developed through the years, particularly from 1993 to the present and surrounding the World Conference on Human Rights. There was the Bangkok Meeting in 1993 of the ministers and representatives of Asian states. This was a preparatory meeting and here they reiterated some of the issues. Also, there was a meeting by ASEAN foreign ministers in July 1993, right after the Vienna Conference, where they



signed a joint communiqué again affirming some of the issues that have been highlighted in the next section.

And then, finally, there was a study committee that was organized at the so-called Asian Inter-Parliamentary Organization which came up with the so-called Declaration of Human Rights in the ASEAN region which again affirmed the basic tenets of consensus and also the issues discussed below.

If one were to sum up the various views on the so-called Asian values, one will see that we can identify three major thrusts of the Asian values concept. The first is universality as against cultural relativism. In summary, the argument has been made that the Universal Declaration of Human Rights was formulated without the significant input from East Asia and Southeast Asian countries. This being the case, it is not always clear to the Asians why the Universal Declaration of Human Rights should constitute their human rights norms. For some who probably have viewed the Universal Declaration of Human Rights as customary international law, then this perspective proposed by some of the ASEAN states may be antithetical to the very concept of customary international law where it recognizes certain pre-eminent principles that actually exist. And that what they are trying to promote in this issue of universality is that we may have to look into our very own cultural practices and traditions in order to come up with our own set of rights. In fact, preparations are being made for some of these governments to come up with an alternative Universal Declaration of Human Rights reflective of the culture and traditions of ASEAN and of Asians in general.

The second issue is the linkage between basic needs strategy, the right to development, and the trade-off between development and democracy. We mentioned earlier that the Universal Declaration of Human Rights actually contains principles of, and emphasizes, Western practice on civil and political rights, with the accompanying suggestions for the adoption of libertarian principles and institutions. Many Asian leaders have

argued that legal and political rights have little meaning for those deprived of basic necessities. They propose that a country at a formative stage of economic growth and political development needs authoritarian rule to achieve balanced growth and contain unsettling consequences of development.

The third is the concept of duty to the state, the community and society as against the rights of the individual. If one were to look at the Universal Declaration of Human Rights as an instrument – as a formal instrument – from a legal perspective, the instrument implies a relationship between the individual and the state since the state has the primary responsibility to promote certain rights. From the perspective of the proponents of Asian values, wherein the emphasis has been on state, society, community and subservience of the individual, there is a proposal that individual rights be balanced with community rights since the state has the responsibility to look after the welfare of all.

Some writers have looked at the issue from the point of view of the so-called strong state and the weak state scenario – where the state is very, very strong in comparison with the weakest institution in society. The implications may be that there may be a lot of delegation of powers to the state, to the point that the individual will no longer be able to participate in any form of decision-making process affecting either political processes like the election or economic and development policies.

Let me cite some quotes to emphasize the point that these values and these ideas and suggestions are actually asserted in practice by at least three of the most passionate advocates. One is Indonesia, the other one is Malaysia, and the third one, of course, is Singapore.

Let me just display excerpts of some pronouncements made at the Vienna conference. This is foreign Minister Ali Alatas of Indonesia saying:

*It is clear therefore that the implementation of human rights implies the existence of a balanced relationship between*



*individual human rights and the obligations of individuals towards the community. In Indonesia, as in many other developing countries, the rights of the individual are balanced by the obligation equally to respect the rights of others. Now, in Indonesia, there is a state ideology that somehow contains the principle that has been pronounced in many of these fora.*

This is Pres. Suharto on the concept of human rights:

*As in the case with other oriental nations, our society has very strong bonds of social solidarity. This kind of order, based on a familial spirit of solidarity, does not only provide a spiritual fortitude to every citizen in our society but also protects its members from the fear of solitude and isolation which often afflicts persons in a very individualistic society.*

Let me move to Malaysia and explain the 2020 vision of Prime Minister Mahathir. This is called the Rukunegara. From the point of view of Malaysia, there is a national ideology that ties up the promotion of human rights with economic development. Principally, what they – the foreign ministers, including of course the prime minister – have been saying is, there is a need for a stage in economic development whereby government must be given the leeway, and that means, perhaps, stifling certain civil and political rights. And if you will look at Indonesia, Malaysia and Singapore, they actually share, in terms of practice of human rights, a common strand of laws like, as I said earlier, the Internal Security Act, or something stifling press freedom, or even the registration of certain organizations and Society's act, for instance. These are very common in the context of these countries.

Now, Singapore has its own concept of human rights in the context of Confucianism. They have the ideology of shared values. The five main pillars of the national ideology are: nation before community, and society before self; family as basic unit of society; respect and community support for the individual; consensus instead of conflict; and religious harmony.

After having seen a summary of these basic concepts from the proponents of the Asian values perspective, one is tempted to immediately make certain conclusions. If one were to look at the practice in at least three of these ASEAN countries (one may want to include Myanmar), there is a very strong state, what some writers have called "soft authoritarianism." And this is supported by certain ideologies purportedly founded on some of the ancient religions. It would be quite unfair to make a conclusion that the religious foundations or the moral foundations really have become culprit to the promotion or, at least, to the violation of certain rights. In many instances, however, it is really more of political expediency that some of the states have used the very moral foundation of rights against the redefinition of rights at the international level. And this has been most pronounced, for instance, in the case of Cambodia, when ASEAN was confronted for the first time on how to deal with the *coup* in Cambodia and its application in ASEAN. If one were to strictly apply the rule of non-interference, then ASEAN would have quickly closed its eyes to what happened in Cambodia. But let me cite to you, just to drive home the point in the form of a conclusion, the latest official pronouncement made by Deputy Prime Minister Anwar Ibrahim when he spelled out a new concept of intervention called "Constructive Intervention." From the traditional ASEAN perspective of constructively engaging other member states with regard to human rights concerns that mainly means we cannot say anything about what's happening within your country, ASEAN seems to have awakened a little bit when confronted with the Cambodian issue. And here I quote deputy Prime Minister Anwar Ibrahim when he said:

*Constructive involvement entails, among other things, the right assistance to firm up electoral processes, an increased commitment to legal and administrative reforms, the development of human capital, and the general strengthening of civil society and the rule of law. This should not compromise our commitment to unity in diversity, cultural or political. Each country must find its*

*path to civil society. Yet there are core humanitarian values we are bound by. In this sense, all of us in our region are our brother's keepers. When the time calls for it, ASEAN must be prepared to act decisively. Readiness is everything.*

With what happened in Cambodia and with what is happening now, at least in the East Timor case where there is the mild application of this constructive intervention, I think there might be some compromises that can be arrived at. The road towards the adoption of human rights mechanism at the ASEAN really hinges upon the adoption of a clear normative framework. If the framework continues to be unclear, it will be very difficult to come to a consensus. I would tend to agree with some of the writers who have said that it may be difficult to really make a one-to-one correspondence between rights in the Universal Declaration of Human Rights and the concept of duties in terms of the ASEAN experience. But one thing is quite common, and that is, in both the experience of the ASEAN and the Universal Declaration of Human Rights, there are certain moral values that are evident regardless of the religious differences and of the political, social and economic backgrounds. And one thing is common, that is, there have been identified fundamental core values such as respect for the individual, promotion of dignity, equality and social justice. These are pre-eminent principles that could become a foundation for a human rights concept at the ASEAN.

## References

- Draft Pacific Charter on Human Rights.
- Declaration of Human Rights in ASEAN region.
- International Covenant on Civil and Political Rights.
- International Covenant on Economic, Social and Cultural Rights.

Second United Nations Conference on Human Rights, Vienna, June 1993.

Treaty of Amity and Cooperation signed in 1976.

1948 Universal Declaration of Human Rights.

World Conference on Human Rights.



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## HUMAN SECURITY: A HUMAN RIGHTS APPROACH TO NATIONAL SECURITY?

Evelyn B. Serrano and Max M. De Mesa

### Introduction

*When we speak of national security, what we refer to should refer to is the security of the people, not the governments...*  
 Jose W. Diokno, *A Nation for Our Children*

News and photos of torture and ill-treatment of Iraqi prisoners by American soldiers have finally erupted in the open. What really is at stake is whether the United States government is going to submit itself to the international rule of law and mete apt punishment to the perpetrators of the violations of human rights.

The repercussions of earlier acts of impunity of the US government and personnel have given blanket justification to similar impunities in the Asian region, where many authoritarian regimes are known for their bad track record on human rights even prior to 9/11 (Forum Asia 2003). Incidentally, the terrible actions of this sole military and economic superpower are not subject to charges that could be brought before the International Criminal Court (ICC) as agreed upon by many Asian states, including the Philippines, through the Bilateral Immunity Agreement (BIA) (AIMCC 2004). The United States is also presently seeking from the UN Security Council another year of exemption from the jurisdiction of the ICC.

Earlier statements of US Defense Secretary Donald Rumsfeld, uncorrected by President Bush, denigrated the Geneva Conventions, which governs behavior during

wartime, by saying that the conventions did not apply to today's "set of facts," suggesting that "the protocols were antiquated," simply did not "precisely apply" and were simply basic rules. This is an example of a state-centric security view which is in complete disregard of human security (read: fundamental freedoms) and of respect for human rights. The beheading of an American civilian, Nicholas Berg, shown to the world in video, is a sad backlash to the inhumane and humiliating treatment against the Iraqi prisoners (Krane 2004).

### Historical Survey of Human Rights

The end of the World War II saw the beginning of the discourse on human rights and human security. While we acknowledge that there are historical and even philosophical and ideological roots to the two ideas, we are presently concerned with the developments of both in little more than the last fifty years. There were emerging "non-traditional" security issues - whether linked to climate change, resource scarcity, declining productivity, movements of people, or transnational issues of criminality and terrorism - which were in reality "human-centered vulnerabilities" confronting the developed world (Liotta, 2002). The shift from a state-centric security or from institutional to human priorities was gaining momentum. In the course of shifting, there is an overlapping of issues involving "state security" (where military forces have traditionally been proven as the best form of protection) and issues involving "human security" (in which instruments and agencies other than the military may prove as primary means of protection) (Liotta 2002, 474). To put it in another way:

*Over the last decade or so the definition of security has been broadened from its old focus on protecting the nation's territory from external aggression to cover the human aspects of "freedom from fear" and "freedom from want" - the security of people (AEPF 2004).*

\* Reprinted from Kasarinjan: Philippine Journal of Third World Studies 19 (1): 37-61.



This paper will tackle the shift from a narrow perspective of human rights that only effectively recognizes civil and political rights to a more wholistic view that expands to cover economic, social and cultural rights. It also veers away from making human rights synonymous with "universal abstractions" to that of "a set of past and on-going social practices rooted in claims and struggles of people's against what they consider economic, social and cultural domination" (Fields 2003). These evolved views served both as the bases and the contents of a rights-based approach to national security. Nonetheless, the same approach would be used to initially assess whether the shift to human security does indeed ensure that "respecting human rights is at the core of protecting human security" (Ogata and Cels 2003, 275).

This paper does not claim to be a comprehensive, much less a final, discussion on the relationship of human rights and human security. Rather, the paper offers discussions to engage the challenges posed by changing contexts. It emphasizes, however, that there is an urgency for such an interface because what is happening on the ground is witness to the attitude of suspicion, if not hostility, by those tasked with national security, such as our experience here in the Philippines, which could lock us in the Cold War mentality.

### Overview of the Development of Human Rights and State Obligations

The horrendous and massive atrocities committed during the World War II, including the infamous attempt to exterminate the Jewish people, the gypsies and homosexuals in the concentration camps of Germany's Third Reich; the rape of Nanking, China by the Japanese occupation troops; and the bombings of Hiroshima and Nagasaki spurred the then international community headed by the nations of the victorious Allied Forces to forge, on December 10, 1948, the Universal Declaration of Human Rights (UDHR).

The UDHR has drawn its validity from the historical sources of peoples' values—their faiths, beliefs and cultures as well as their struggles—to affirm a common dignity as basis for the human rights of everyone, everywhere. Human rights, then, are the inherent expressions of dignity as human beings recognized by international laws. The criticism that only a minority signed and ratified the Declaration compared to the present membership of the United States and other existing nations, was answered and rendered moot and academic by the overwhelming affirmation of the UDHR, emphasizing a wholistic view of human rights, by the Second World Conference on Human Rights which produced the Vienna Declaration on Human Rights in 1993. The slogan for the 50<sup>th</sup> anniversary of the UDHR in 1998, "All human rights for all," stressed the characteristics of human rights. This should be a reminder against the danger to "relegate human rights to a purely strategic or tactical device to be used in power struggles against political or economic regimes that are being opposed on other more self-serving grounds" (Fields 2003).

We are aware that the Universal Declaration of Human Rights is a *declaration*. Although not legally binding, the UDHR is an aspirational document that has set common standards for the development of human potentialities. It has also set the stage for the establishment of state obligations.

Efforts to forge legally binding documents based on the UDHR were subjected to the ideological divide strongly existent among the nation-states of the period. It took some 30 years to produce legally binding covenants asserting civil, cultural, economic, political and social rights of persons and peoples for the growing international community. These are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Together, the two covenants "constitute the bedrock of the international normative regime in relation to human rights" (Steiner and Alston 1996, 256).



It is appropriate to note that almost all the provisions found in the UDHR are incorporated into either of the two covenants. These two international covenants are treaties and, as such, are part of international law. Later, the UDHR, the ICCPR and the ICESCR were accepted as the International Bill of Rights. The Philippine Constitution has enshrined these human rights in its Bill of Rights article. Furthermore, the Philippines is state party to most of the major international human rights instruments. It established the Philippine Commission on Human Rights to monitor government compliance to its obligations and to create a human rights culture according to the international standards called the Paris Principles.

The characteristics of human rights are universality, indivisibility, interrelatedness and interdependence. Human rights are universal because they are for everyone, everywhere. They are non-discriminatory. Indivisibility means that human rights cannot be divided or fragmented among a country's constituents. One cannot just implement the right to adequate food for everyone while depriving people of their civil and political rights. Violation of one right usually leads to the violation of another. For instance, not granting due process to a person could easily violate the person's right to work and health and can have repercussions on the rights of the person's child to education and food.

The state has a trinity of obligations in relation to the implementation of human rights: to respect, to protect and to fulfill (facilitate and provide). To respect means that the state refrains from interfering in the lives or properties of persons and peoples. Nonetheless, the state is obliged to protect its constituency from Third Parties who are violating persons' and peoples' rights. During times of wanton destruction by nature or by men, the state must take "appropriate measures" to facilitate assistance and to provide people who, in normal times, could help themselves with their needs.

## ICESCR: A Casualty of the Cold War

While the most, if not all, unswervingly subscribe to the words adopted by the Second World Conference on Human Rights in Vienna that the two sets of rights are "universal, indivisible, interdependent and interrelated" (Vienna Declaration 1993), it should be remembered that the relationship of these two sets of rights "had become a casualty of the Cold War" (Steiner and Alston 1996, 257) and influenced by the de-colonization period. As a result, any positioning regarding the sets of rights, particularly in relation to economic and social rights, was perceived to be either ideologically influenced or determined. Concomitantly, it could be stated that during those years, "the principle of the equality of the two sets of rights has often been more honored in the breach than in the observance" (Steiner and Alston 1996, 266). While formal consensus was maintained through lip-service given to rights,

*The shocking reality... is that States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights (Steiner and Alston 1996, p. 266).*

Another result was the popularization of the ICCPR and its institutionalization in national human rights institutions, like the orientation of the Philippine Commission on Human Rights even after Martial Law Period in 1987. There was a downgrading of economic, social and cultural rights (ESCR) and regarded as at best, vague and nonjusticiable, and at worst, seen not as real rights at all. Internationally, ESCR has become "paper rights" ceremoniously enshrined in the ICESCR. Hence, it was imperative to retrieve and to revivify the Covenant



Language – i.e., “the language of right, not merely of hope; of undertaking and commitment by governments, not merely of aspiration and goal” (Steiner and Alston 1996, 271 citing Henkin 1984 in Meron 1984).

### **Limburg Principles: Nature and Scope of State of Obligations**

Ten years after both Covenants have been enforced in 1976, a group of experts in international law convened to discuss the nature and scope of the obligations of States Parties to the ICESCR (Dankwa, Flinterman and Leckie 1998). The group included the International Commission of Jurists, the Maastricht Centre for Human Rights of the University of Limburg (The Netherlands) and the Urban Morgan Institute for Human Rights, College of Law, University of Cincinnati (Ohio, USA). The result of the meeting was the Limburg Principles. Thereafter, these Principles became an official United Nations document. This is the only UN document referenced in the UN Commission on Human Rights Resolution 1993/14 that did not originate from any of its institutions or personnel (Limburg Principles 1987). The significance of its inclusion underscored the fact that the Principles have been accepted and endorsed by the most important UN body in the human rights field.

Though not an absolute certainty, the notable absence of academic criticism confirmed the notion that the Principles have been largely accepted by human rights scholars. There are 103 individual principles formed to address “the complexity of the substantive issues covered by the ICESCR,” the provisions of which are often “vaguely-worded” (Martin 1997).

### **Maastricht Guidelines: Focus on the “Violations Approach”**

Ten years after the formulation of the Limburg Principles and its acceptance as an official UN document, another workshop was convened in 1997. This group was composed of the International Commission of Jurists, the Maastricht Center for Human Rights and the Urban

Morgan Institute for Human Rights. This time, the focus was “the relevance of a ‘violations approach’ in order to strengthen the monitoring of the CESC” (Dankwa, Flinterman and Leckie 1998).

Much had happened in the world in the intervening ten years. Consider some of the following data given by the United Nations Development Programme, Human Development Report in 1991 (Steiner and Alston 1996, 265-266):

*Poverty – Over one billion people live in absolute poverty.*

*Nutrition – Some 180 million children, one in three, suffer from serious malnutrition.*

*Health – One and half billion people are deprived of primary health care. Nearly three million children die each year from immunizable diseases. About half a million women die each year from causes related to pregnancy and childbirth.*

*Education – About a billion adults cannot read or write. Well over 100 million children of primary school age are not in school.*

*Gender - Disparities between men and women remain wide, with female literacy still on two-thirds that of males. Girl’s primary enrolment rates are a little over half that of boys’ and much of women’s work still remains underpaid and undervalued.*

*People in all developing regions share these problems, but the most urgent problems tend to differ. In Latin America, South Asia and the Arab States, poverty is reinforced by the very unequal distribution of assets.*

In the face of increasing inequities and worsening impoverishment, economic, social and cultural rights have received more, although certainly not yet sufficient, attention at the government levels. In 1993, the CESC issued to the World Conference on Human Rights a



statement which confirmed massive human rights violations.

The fact that one fifth of the world's population is afflicted by poverty, hunger, disease, illiteracy and insecurity is sufficient to conclude that the economic, social and cultural rights of those persons are being denied on a massive scale. Yet there are still staunch human rights proponents – individuals, groups and governments – who completely exclude these phenomena from their concerns. Such approach to human rights is inhumane, distorted and incompatible with international standards (Steiner and Alston 1996, 2660). This phenomenon has introduced restlessness, rebellions, uprisings and, eventually, "terrorism." The "vulnerabilities" of affected sectors have been transforming the sectors into "threats" which can eventually become state security concerns. This and similar situations have broadened our understanding of state security. Formerly, it focused mainly on protecting the state - its boundaries, people, institutions and values - from external attacks. At present, the changing international and national environments, including the impact of the globalization process, have contributed to the tensions, violence and conflict within countries. It must be acknowledged that the gaps between rich and poor countries – between wealthy and destitute people – have never been greater than today (Ogata and Cels 2003).

The 1994 United Nations Development Program (UNDP) Human Development Report updated the above-mentioned deteriorating situation and articulated the "shift in normative thinking about human security" (AEPF 2004). The report showed the failure of governments, particularly the state parties to the covenants, to comply with their obligations to "progressively realize" the economic, social and cultural rights of their peoples. International finance and trade institutions likewise have contributed in taking advantage of and exacerbating the "vulnerabilities" of the peoples in developing countries. The structural

adjustment programs of the World Bank have thrown many countries and people into an inescapable debt trap.

To reverse this course of events, the State must primarily respond to these "vulnerabilities," an act which can be beneficial to its political, economic and social stability. Integral to this state security is human security, which according to the UNDP Report,

*covers the following dimensions: economic, food, health, environmental, personal, community and political. Above all, human security is about protecting people from severe and pervasive threats, both natural and societal, and empowering individuals and communities to develop the capabilities for making informed choices and acting on their own behalf (AEPHR 2004).*

This view which the UNDP presented almost a decade ago emerged again in the definition given by the UN Commission on Human Security in 2003. It defined human security as "protecting the vital core of all human lives in ways that enhance human freedoms and human fulfillment" (Ogata and Cels 2003, 274). This means protecting vital freedoms which refer back to the inalienable fundamental rights and freedoms that are laid down in the UDHR, the International Bill of Rights and other human rights instruments. In the human rights language, "to protect" is a basic state obligation. The state is to protect its constituency from a third party's violation of human rights. In fact, in the new security discourse, the security of peoples' rights takes precedence and informs all other security concerns. It also starts with the recognition that people are the most active participants in determining their well-being.

#### State Obligations: Converging Human Rights and Human Security

Human Security does not replace state security, but rather reinforces it. Human rights do not encompass human security, but rather the latter encompasses the former, which include access to education and to health care, governance, ensuring opportunities and choices for



each person and people to achieve their full potential. Human security complements human rights. While the understanding of state security has broadened, comprehension of the range of state obligations likewise widened.

The compliance of states parties which ratified one or both of the covenant(s) is being monitored by their respective mechanisms – the Human Rights Committee (HRC) for the ICCPR and the Committee for Economic, Social and Cultural Rights (CESCR) for the ICESCR. Other human rights treaties may or may not have their own monitoring bodies.

Since the texts of international human rights treaties are not always defined precisely to accommodate different legal systems, the treaty monitoring bodies give interpretations of the content of specific articles of the relevant treaty and the obligations of governments. These interpretations are known as General Comments, which have increasingly become authoritative interpretations of various categories of rights (Ravindran 1998, 65).

According to the ICESR, a state party to the covenant “undertakes to take steps...with a view to achieving progressively the full realization” of these rights (ICESCR 1967, see also OUNHCHR 1990). The General Comments of the UNESCR also make more concrete the directions that the state party must consider in the implementation of human rights by the initial enumeration of the key elements of each right.

The right to adequate food, for example, has the following key elements: nutritiously adequate, safe, culturally acceptable, accessible (physically and economically) and sustainably produced (UNESC 1999). The right to water, as explained in General Comment No. 15 (UNESC 2002, see also CEDAW 1981, CRC 1990), is implemented with the following key elements: availability (sufficient water supply for personal and domestic uses; continuous water supply for personal and domestic uses; quantity of water available for each individual should correspond to World Health Organization (WHO) guidelines; some individuals and

groups may require additional water due to health, climate and work conditions), quality (safe, free from microorganisms, chemical substances and radiological hazards; acceptable color, odor and taste for personal or domestic use), and accessibility (economically, physically, without discrimination and with sufficient information dissemination). The right to health has these key elements (UNESC 2000): availability (functioning public health and health care facilities; goods and services and programs in sufficient quantity including the underlying determinants of health), accessibility (without discrimination, physically, economically, and with sufficient information dissemination); acceptability (respects medical ethics and culture; sensitive to gender and life-cycle requirements; respects confidentiality and improves health status), and quality (scientifically and medically appropriate).

The assessment as to whether the state party has implemented or violated a human right is also guided by the key elements together with the consideration of inability or unwillingness of the concerned state. Thus, the statement that human rights must inform human security subsumes the explanation above regarding the key elements of human rights.

On the whole, the implementation of human rights not only helps in preventing and mitigating the impact of violent internal conflicts, but also contributes to inclusive and equitable development and respect for human dignity and diversity.

### Challenges to Human Rights and Human Security

Since human security is people-centered, it takes into serious consideration peoples' and persons' rights in new contexts, such as globalization and internal conflict. There is a whole range of menaces other than external aggression. Citizens have to be protected from environmental pollution, transnational terrorism, massive population movements, infectious diseases such as human immunodeficiency virus/acquired immune



deficiency syndrome (HIV/AIDS), and long-term conditions of oppression and deprivation.

Another aspect is the broader range of actors, with the states no longer as the sole actors. Non-state actors such as regional and international organizations, nongovernmental organizations (NGOs), civil society groups, transnational and multinational corporations, armed liberation groups, and others with access to coercive force, are involved and impact on both human rights and human security not only within the state but also frequently on the neighboring states and the immediate region.

Between 1990 and 2001, there were 57 major armed conflicts in 45 countries (UNCHS 2003, 21). Most of these conflicts were internal. The UN Commission on Human Security enumerates some of the key factors that cause these conflicts (UNCHS 2003, 21):

1. Competition over land and resources
2. Sudden and deep political and economic transitions
3. Growing inequality among people and communities
4. Increasing crime, corruption and illegal activities
5. Weak and unstable political regimes and institutions
6. Identity politics and historical legacies, such as colonialism.

This section shall raise issues primarily pertaining to human rights in relation to the loss of human security leading to the outbreaks of violent internal conflicts. Their consequences are devastating to peoples and to the environment, including the collapse of the state and its institutions, and extensive and intensive poverty. Gross human rights violations and war crimes are committed. Prolonged internal armed conflict siphons much of the state's attention and resources such that the opportunities and choices needed for persons and peoples to attain their full potential are diminished or taken away. The

majority of the people are deprived of their right to development.

Let us take the example of Nepal and its seven-year old Maoist insurgency. When the peace talks collapsed in November 2002, a nationwide emergency was declared. The army was ordered to put down the insurgency. The King promulgated an ordinance giving the government expanded powers of arrest and detention. The parliament subsequently adopted this ordinance as the Terrorism and Disruptive Activities Act (TADA). In October the following year, the King dissolved the parliament and appointed a new government. A ceasefire was called in 2003 and a renewed process of negotiations between the government and the Maoists took place. In May, the peace talks collapsed again. Fighting has since been going on.

In June 2003, an international fact-finding mission was formed. Here are some of their major conclusions and recommendations:

*The dissolution of the Parliament, combined with the failure to hold elections within the six-month time frame required by the Constitution, and the formation of a government consisting of unelected ministers from out of the major political parties, has (sic) placed a profound stress on the democratic and constitutional framework of Nepal. Because the principal ministers seem to be answerable only to the King, Nepal is perilously close to slipping from a constitutional towards an absolute form of monarchy (ICJ/CJL 2003).*

At present, there exists no mechanism by which to determine the limit of the monarchy's authority under the Constitution. The Constitution provides that actions of the monarch are non-justiciable. Therefore, a monarch carrying out an action arguably outside his constitutional authority or in clear breach of such authority cannot be legally challenged for such transgression. The government of Nepal has even sought to undermine the independent National Human Rights Commission by proposing the establishment of a parallel human rights



unit directly under the supervision of the Prime Minister, who is answerable only to the King.

The adoption of the TADA has effectively legitimized the widespread practice of arbitrary detention in contravention of articles 9 and 14 of the ICCPR. Persons detained under TADA are particularly vulnerable to torture. Such persons are often not informed of the reason for their arrest, are not promptly taken before a court, and are held for prolonged periods without charge, whether for preventive or investigative purposes. As no state of emergency now exists in the country, TADA on its face contravenes Nepal's international legal obligations. Officials of the army, armed police forces and police engage in serious human rights violations including torture, unlawful killings and war crimes with impunity.

According to the US-based Human Rights Watch, officers at army barracks have been refusing to accept *habeas corpus* notices issued by the Nepal Supreme Court on behalf of detainees (Human Rights Watch 2004). By failing to make torture a specific crime in its legislation, Nepal is in dereliction of a core obligation under the Convention Against Torture. Judges do not consider inquiring into a detainee's treatment or questioning how "confessions" are obtained as component responsibility. An unknown but substantial number of persons are presently held incommunicado in unacknowledged military detention without trial. Many of them are subject to interrogation under torture. These detentions are unlawful because the military has no authority to hold persons.

Alongside these widespread human rights violations in the civil and political spheres are the unabated violations in the economic, social and cultural lives of the *dalits*. Ten of thousands of *dalits* in Nepal suffer *de facto* discrimination (HRTMCC Nepal 2004). Even if there are existing legislations which prohibit all practices of caste-based segregation, these discriminatory acts exist in various forms: religious, social, cultural, occupational, educational and residential. *Dalits* in Nepal consider

themselves Hindu but they are not allowed to freely worship in Hindu temples. They are not allowed to sit, work, or eat together with the "higher" caste people. Religious ceremonies, events and festivals with higher caste groups are off limits to them. *Dalit* students are segregated in seat arrangements and in access to water taps.

Such "vulnerabilities" feed the on-going Maoist "threat" to the Nepalese state. A cycle of retaliations victimizes mostly the civilians, as shown in an incident documented by a Nepalese human rights organization, the Informal Sector Service Center (INSEC). It condemned in May 2003 the attack of the Maoists in the SOS Children Home in Birendranagar of Surkhet District where the Maoists woke the children up and destroyed their beddings (Forum Asia 2003b). In this case, civilians have become victims and casualties of conflict between the government and a non-state actor who both use arms and coercive force.

The Nepalese government certainly needs to shift its focus to human security to alleviate the suffering of its people and to resolve the root causes of the internal armed conflict. Human rights organizations should take note of INSEC documentation of the human rights abuses of the Maoists and government institutions and forces. Many, if not most, human rights organizations monitor mainly, if not solely, the compliance of their own government's obligations to the various treaties. There is a need to review this limited mandate especially in the face of armed non-government elements and corporations who operate as quasi-state entities with access to coercive force (UNCHS, 2003, p. 24).

A human security approach is proposed with the following five essential policies:

1. Placing human security on the security agenda
2. Strengthening humanitarian action
3. Respecting human rights and humanitarian law
4. Disarming people and fighting crime
5. Preventing conflict and respecting citizenship



From a human rights perspective, the human security agenda must ensure the overall shift from a state-centered to a people-centered security. It also requires a gender-sensitive focus on the vulnerable groups. With very few mechanisms that can be invoked to protect people in violent conflict, it is necessary to build and strengthen peoples' capabilities for conflict prevention and peace building. There is, however, no one rights-based approach. Nonetheless, these approaches are similar in that they challenge many of the assumptions and established ways of thinking and working in institutions and organizations. Each also addresses power relations at all levels of society (see Theis 2004). A human rights approach ensures the acceptance and implementation of the principles of:

1. equity and non-discrimination – concentrating on the worst rights violations and paying particular attention to the most marginalized people;
2. accountability - strengthening the accountability of duty bearers for human rights at all levels. This should be achieved through a combination of direct action, changes in laws, policies and resource allocations, changes in institutional rules and practices and changing attitudes and behaviors;
3. participation - supporting rights holders (e.g. children, adult and civil society institutions) to demand their rights.

In conflict situations, a rights-based approach to humanitarian actions enhances peoples' participation and empowers them to choose and organize the assistance that they need. It minimizes the possibilities of humanitarian actions being used for political ends. It stresses the right to life, health, food, shelter and education. It also underscores non-discrimination policies – equality and equity, as well as the rights of

vulnerable groups such as women, children, the elderly, the disabled and refugees.

The "near total impunity" situation in Nepal cannot be taken apart from a regional situation wherein redress is not just difficult but seems to be nowhere in sight. Victims of human rights violations and civilian casualties are bereft of a mechanism that would provide them justice. For one, Asia is the only region which does not have a regional human rights mechanism compared to that of the Americas, Africa, and the European Union. The Association of South East Asian Nations (ASEAN) has put on hold the efforts to set up an ASEAN Human Rights Mechanism. Up to the Bali Meeting of the Heads of State in October 2003, there was barely a possibility of establishing this. However, none of the earlier suggested processes made in the Third Workshop for a Regional Mechanism on Human Rights in Bangkok, May 28-29, 2003, has been realized. The anemic responses of the ASEAN Foreign Ministers to attacks against Daw Aung San Suu Kyi which were staged-managed by Burma's military junta and her being held incommunicado, as well as the subsequent acceptance of the junta's delaying actions towards democratization, eroded any statement on the promotion of fundamental freedoms in the region.

Another problem is the negative influence in Asia of the US-led campaign against global terrorism through the BIAs. These agreements, of which Nepal is a signatory, were used to debilitate the prestige of the ICC and to limit the scope of seeking justice by human rights victims through the exemption sought by the United States for their nations (Human Rights Watch 2003). The significance of this agreement and the non-signing of the United States of the Rome Statute are all the more pronounced in the exposure and admission of torture, inhumane and ill-treatment of Iraqi prisoners in Abu Ghraib prison in Baghdad and other human rights violations in other places. It is interesting to note that most of the countries which yielded to US carrot and stick tactics were from Asia (AMICC 2004). National, regional and international human rights mechanisms

should be set up to monitor state obligations and ensure redress and reparations of the victims of human rights violations (UNCHS 2003, 29).

The 'near total impunity' in Nepal could well have been covered by the "blank check to nations who are inclined to violate human rights" through the example set by the United States in its violations of the Geneva Convention in Guantanamo Bay and Abu Ghraib prisons (Gross 2003). Earlier, Rais Yatim, Malaysia's de facto "law minister", explicitly relied on the detention at Guantanamo to justify Malaysia's detention of more than 70 suspected Islamic militants for over two years. Rais stated that Malaysia's detentions were 'just like the process in Guantanamo,' adding, "I put the equation with Guantanamo just to make it graphic to you that this is not simply a Malaysian style of doing things" (Yoon 2003).

*What is now being described as the "war on terrorism" dominates national and international security debates. In addition to military actions, it has increased the attention to other tools to fight terrorism, such as tracking (and blocking) flows of funds, information and people.... Yet these actions focus on coercive, short-term strategies aimed at stopping attacks by cutting off financial, political or military support and apprehending possible perpetrators. Equally, state-sponsored terrorism is not being addressed, while legitimate groups are being labeled as terrorist organizations to quash opposition to authoritarian government policies. And fighting terrorism is taking precedence over protecting human rights and promoting the rule of law and democratic governance (UNCHS 2003 23)*

While human security examines human rights in relation to states and non-state actors, it must also look for ways to equally enforce the rule of law. It is imperative that "human security should be mainstreamed in the agendas of international, regional and national security organizations" (UNCHS 2003, 23).

Upholding fundamental human rights and humanitarian law in conflict situations is another gap to

be closed by strengthening human rights organizations at all levels and by reconciling divided communities. The ICC should prosecute perpetrators of serious human rights violations. Countries should set up tribunals and truth and reconciliation commissions. These institutional and rights-based efforts should be complemented by community-based strategies to promote coexistence and trust among people.

### Factors Contributing To Internal Conflicts

#### *The Flow of People*

Migration of persons and peoples due to internal conflicts, as well as the impact of globalization, challenges the "foundational assumption of international human rights law, namely, that the primary, and often exclusive, responsibility for protecting and implementing "universal" human rights lies with the state under which one is a national" (Donnelly, 2002, p. 226). Crossing national boundaries subjects a citizen to delimitation of one's right (economic and social) and political participation.

International human rights law leaves very much to the states the discretion to grant citizenship and benefits to foreigners. These include situations where demands of the labor market abroad *vis-à-vis* the growing unemployment and insufficiency of wages at home lead to the swelling of "illegal" migrants and temporary workers without rights of residence in other countries. This is prevalent because many countries like to have more workers, but not more citizens.

More complex situations could be seen in the experiences of the internally displaced persons due to internal conflict. Examples are the Acehnese seeking refuge in Malaysia, Rohingya people of Burma now residing in Bangladesh (Forum Asia 2003), and the Burmese scattered in the borders of Thailand and India (Forum Asia 2003b). There is a need to look for an institution that would surmount state territorial limitations to ensure the upholding of all human rights



for everyone, everywhere. In this case, globalization may encourage practices that foster "multiple political identities" (Donnelly 2002, 231).

Until we have established and developed institutional mechanisms to implement and protect internally-recognized human rights, people will continuously struggle to ensure that states will have a rights-based approach to governance. An active state is even more essential for the implementation of economic and social rights. It is the right direction to obtain human security.

#### *Market Flows*

There is an increased mobility of corporations escaping from the costs imposed by welfare state guarantees of economic and social goals. This, on one hand, affects the employment position of the corporation's country of origin, while providing people of the country of destination opportunities to better their economic and social conditions. But without a state or corresponding institutions that would uphold human rights, human security cannot be guaranteed. This is demonstrated by firms violating health and safety regulations and relocating dangerous production that at least partly cancels any income and investment benefits they bring. The impoverishment brought about by these situations further widens the gap between the rich and the poor, contributing to the making of a violent internal conflict.

Another aspect is the movement of state responsibility to regional and international institutions or organizations. The countries in the Asian region are being asked to maintain their commitment to the other agenda of liberalized trade and financial flows "regardless of actions being taken by other countries in the Economic, Social Commission in the Asia-Pacific of ESCAP region" (UNESCAP 2003). Consequently, the protection of human rights is also no longer the sole concern of the state at the national level since it has also become a concern at the regional level. It emphasizes

the need for victims of human rights violations to have access to needed-to-be-established regional venues to obtain redress, reparation and rehabilitation.

#### *Flow of values and norms*

According to Amartya Sen, "If the grabbing of Asian values by the champions of authoritarianism has to be effectively and fairly questioned, what is needed is not the claim -often implicit- of the superiority of what are taken as Western values, but a broader historical study of Sanskrit, Pali, Chinese, Arabic and other Asian literature" (Ravindran 1998, 46). This was meant as a rebuttal to authoritarian upholding of "Asian values" to justify the curtailment of some human rights of their constituencies and the building of a "culture of impunity" (TFDP 2003). We have seen at the first parts of this paper the negative influence of the United States' model on human rights norms and value. A backlash can stir up, if not exacerbate, an already existing violent internal conflict.

Besides countering a homogenized Western "consumer culture" that has a negative impact on human rights, there is a need to incorporate in both formal and informal education curricula human rights concepts and principles. Schools and their teachers, whether in developed or developing countries, should teach mutual respect and solidarity. While recognizing that the same can perpetuate prejudice, they have the opportunities and choices to teach identity and ideals forming strong value systems, particularly tolerance and compassion. There is a need to underscore again the "universalizing (indeed some would say globalizing) mission" of human rights (UNESCO, SCPPHR, 1999). To point out the universalizing mission is evident in the assertion that the regime of rights and freedoms established through the Universal Declaration of Human Rights - and the numerous other instruments that have since been promulgated in the same spirit - extend beyond the arena of purely national concern (UNESCO, SCPPHR, 1999).



### Human Security Does Not Ensure Human Rights

The state obligations to respect, protect and fulfill human rights affirm the dignity of each person and people, as well as create an environment for the full development of their potentials. Consequently, human rights contribute significantly to the achievement of human security which in turn secures the state. The reverse is not necessarily true - that in securing the state, human security is secured which in turn respects, protects and fulfills human rights. State-centric security, as implemented in some Asian countries, often discriminates against the vulnerable sectors in the granting of human security which is acquired through the disregard for human rights. Many human rights, particularly economic, social and cultural, still have to be justiciable. Human security has to guarantee the mechanisms whereby people, especially the vulnerable, could seek redress, reparation and rehabilitation.

A second look at the UN Commission on Human Security report, *Human Security Now*, gives cause for caution from one coming from a human rights perspective or framework. While one could easily welcome the paradigm shift from a state-centric to a people-centered security, as well as many other aspects that help advance human rights, it must be asked whether the people are recognized and accepted as persons who are endowed with human rights (UNCHS 2003, 24). The UNCHS report states: "Putting human security on the security agenda would inspire concern for vulnerable groups during conflict and amplify support for protecting all human rights." The same chapter contains a section on "rights-based approaches." However, it must be pointed out that the section narrowly refers to using the approach in relation to humanitarian action in conflict situations. This is correct and is imperative, but should not be limited to such a situation. There is need for consistency and permeation of the rights-based approach in all situations, in war and in peace.

The report presents human security as encompassing human rights, education, health, development and national security. It even states that human security complements human rights. Does this mean that human rights are the basis for education, health, development and even for national security? If this is so, then it can be expected that the authors explicitly mention that the education, health and development components are human rights.

Chapter 6 of the report states, "Better health for human security." This shows that a compromise has been made because the approach to this section is not the human rights framework or the rights-based approach. The nearest reference is "good health is instrumental to human dignity and human security" (UNCHS 2003, 96). The global health situation has been presented wherein health has become a national security problem, but it has not been dealt with from a human rights perspective. The obligations of the state in relation to health, as elaborated more concretely in the UN CESCR General Comment No. 14, have not been made as a reference point. This means taking into consideration the key elements of the right to health and its underlying determinants. Food, for example, is an underlying determinant of the right to health. Among others, this shows the interrelatedness of rights. The increase of malnutrition, as in the case of the Philippines, raises proportionately the vulnerability of people to accept violence as the only remedy to their situation (Florence 2004). Nowhere in this chapter is the right to health mentioned at all. State accountability and obligation to make the right to health more justiciable are glaring gaps that need to be addressed. National, regional and international venues for redress, reparation and compensation must be established and made accessible to victims. Nonetheless, the section makes it very clear how health becomes a security concern of the state, especially in trans-border diseases, such as HIV/AIDS or, more recently, severe acute respiratory syndrome (SARS). Furthermore, it has linked diseases with poverty



and conflict. The resolutions of the health issues is left to the state, with the high possibility of being subjected to intensive lobbying of politicians not infrequently on behalf of multinational pharmaceutical companies.

Take the example of HIV/AIDS in Africa. Medicine of the generic type has been found effective. The pharmaceutical companies coming from the developed countries have initially refused to have the medicine produced. While unspeakable, it is known that the financial considerations were paramount and at stake. Eventually, due to strong counterlobby of the concerned Africans and their allies, the medicine has been allowed to be manufactured. A similar incident in the Philippines was the production of a much less expensive medicine for hypertension (Robles 2004). A Sweden-based multinational pharmaceutical company, AstraZeneca, demanded that the local company, L.R. Imperial Inc., a division of Unilab, halt the production of the said drug. Those who are already poor could have been condemned to unabated deterioration of their health, because the medicine would have been economically inaccessible had the court not lifted the temporary restraining order (TRO).

Sadly, such attitude has precedents. This was during the 1980s and 1990s, when, even with tuberculosis ravaging the peoples of Africa, not a single international pharmaceutical company produced antituberculosis drugs (New Internationalist 2001). The pharmaceutical companies concentrated instead on research and eventually production of items whereby the rate of return was rather high, like Viagra (New Internationalist 2001).

"Health for All," promulgated at the Primary Health Care Conference at Alma Ata in 1978, has not been realized. It was then a logical move out of the enthusiasm following the earlier entry into force of the two international covenants (the ICCPR and the ICESCR) in 1976. One reason given for this failure was "weak political will" (UNCHS 2003, 107). This scenario transcended the national and international levels. An in-depth study and research into this period could draw attention to the

factors contributing to "weak political will." It must be recalled that the intervening two decades saw the formulation of both the Limburg Principles and the Maastricht Guidelines in relation to state obligations. Within that period, "public systems have not been adequately developed, and private markets in health care have catered only to those with the money to pay for care" (UNCHS 2003, 107). The neglect has multiplied vulnerabilities that turned some into threats to national and multi-nation security.

The inclusion of health services in the Trade Related Intellectual Property Rights (TRIPs) in the agenda of the World Trade Organization (WTO) seems to be setting, albeit in a more intensive manner, the same situation that created the past vulnerabilities of peoples, particularly in the Third World. In one UN Commission report, the commissioner applied a human rights approach to the said subject, relating it to the aspect of health and the TRIPs Agreement. Among others, he said: "The starting point for a consideration of the operational aspects of IP systems with regard to access to drugs is that access to essential drugs is a human right." This is an implicit reference to one of the key elements of the right to health - accessibility - which is included in state obligations. States are to protect the right of poor people to access needed drugs. These public goods, which have the prices charged by patent owners, can seldom be afforded by poor peoples. Other than diseases, the impunity with which developed countries extract the natural resources and indigenous knowledge related to health and healing from the developing countries with the use of capital, science, technology and coercive force negatively impact on the outlooks and action of peoples in the latter.

Revitalizing and re-ensuring "health for all" will require the empowerment of people. Initial successes and further empowerment could mold the political commitment of those in political institutions for the progressive realization of people's right to health. Eventually, this could include enabling people to direct sustained investments and infrastructure to universal



prevention and care. It would be further instructive if the same rights-based approach were done to other components of human security, particularly education and development. Internal vulnerabilities are likely to dominate the security environment (Liotta 2002, 473). Dialogue, transparency and cooperation from all sectors of civil society and all levels of governance must be encouraged and built to detect any disregard or cooptation of human security by national security. Human rights must be an integral component of any strategic response to emerging problems and challenges.

While the discourse on human rights and human security is still on-going and new problems have to be resolved, the broadening of views should be welcomed. Filipino statesman Jose W. Diokno once wrote, "Human rights are more than legal concepts; they are the essence of (every person). They are what make (each one of us) human. That is why they are called human rights: deny them and you deny (a person's humanity)." (Diokno 1987, 1-6). A human rights approach ensures that the characteristics of rights are applied with equity and without discrimination for everyone everywhere. Modifying the proposition made at the beginning of this article, instead of "respecting human rights is at the core of human security," it should read "human rights must permeate human security."

## References

- The American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC) (2004) Bilateral Immunity Agreements. Available from: [http://www.amicc.org/usinfo/administration\\_policy\\_BIAs.html#countries](http://www.amicc.org/usinfo/administration_policy_BIAs.html#countries).
- Asia Europe Peoples Forum (AEPF) (2004) *Human Security: Economic and Social Security*. Available from: <http://www.jpdp-ph/AEPF/AEPF%20Site/webcontent/pages/Human%20Security.html>.
- Convention on the Elimination of All Forms of Racial Discrimination against Women (CEDAW) (1981). Available from: <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.
- Convention on the Rights of the Child (CRC) (1990) Available from: <http://www.unhcr.ch/html/menu3/b/k2crc.htm>.
- Dankwa, Victor, Cees Flinterman and Scott Leckie (1998) "Commentary on the Maastricht guidelines on violations of economic, social and cultural rights". *Studie en Informaticentrum Mensenrechten (SIM) Special No. 20*. Utrecht: *Studie en Informaticentrum Mensenrechten*. Available from: <http://www.uu.nl/content/2002.pdf>.
- De Mesa, Teodoro M. (2003) "Limburg principles and Maastricht guidelines: Progressive steps towards further realization of economic, social and cultural rights", Paper presented at the National Training on Ngo Capacity Building on Writing Official/Alternative Report on Implementation of ESCR, 3-5 September, Ulaanbaatar, Mongolia.
- Declaration on the Right to Development (DRD) (1986) Available from: <http://www.unhcr.ch/html/menu3/b/74.htm>.
- Diokno, Jose W. (1987) *A Nation for Our Children*, Quezon City: Claretian Publications.
- Donnelly, Jack (2002) "Human rights, globalizing flows, and state power". In *Globalization and Human Rights*, Alison Brysk, ed., 226-241, Los Angeles: University of California Press.
- Fields, A. Belden (2003) *Rethinking Human Rights for the New Millennium*, New York: Palgrave Macmillan.
- Florencio, Cecilia A. (2004) *Nurture in the Philippines: the Past for its Temple, Red for its Color*, Quezon City: The University of the Philippine Press.
- Forum Asia (2003a) "Bangladesh repatriates hundreds of Rohingya refugees to Burma". Available from: <http://www.forumasia.org/modules.php?name=News&file=article&sid=44>.
- Forum Asia (2003b) "Human rights in Asia: pushed to the brink", Annual Human Rights Report, Bangkok, Thailand: Forum Asia.
- Forum Asia (2003c) "Indian government should investigate police". Available from: <http://www.forumasia.org/Pressrelease.html>.
- Gross, Doug (2003) "Carter: US human rights missteps embolden foreign dictators". *Associated Press*, 12 November.
- Human Rights Treaty Monitoring Coordination Committee (HRTMCC) Nepal (2004) Shadow report 2003 to the periodic report of the government of Nepal on the Convention of Elimination of All Forms of Racial Discrimination.



Human Rights Watch (2003) Bilateral immunity agreement. Available from: <http://www.hrw.org/campaigns/hc/docs/bilateralagreements.pdf>.

Human Rights Watch (2004) "Between a rock and a hard place: civilians struggle to survive in Nepal's civil war". *Human Rights Watch* 16 (2): 1-104.

International Commission of Jurists and Centre for the Independence of Judges and Lawyers (ICJ/CILJ) (2003) Human rights and administration of justice: Obligations unfulfilled. Fact-finding mission to Nepal, Switzerland: International Commission of Jurists. Available from: [http://www.icj.org/news.php?id\\_article=2950&lang=en](http://www.icj.org/news.php?id_article=2950&lang=en).

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1969). Available from: [http://www.unhcr.ch/html/menu3/b/d\\_icerd.htm](http://www.unhcr.ch/html/menu3/b/d_icerd.htm).

International Covenant on Economic, Social and Cultural Rights (ICESCR) (1976). Available from: [http://www.unhcr.ch/html/menu3/b/a\\_icescr.htm](http://www.unhcr.ch/html/menu3/b/a_icescr.htm).

Krane, Jim (2004) "Soldier pleads guilty in Iraq abuse case", *Yahoo! News* 20 October. Available from: [http://story.news.yahoo.com/news?tmpl=story&u=/ap\\_on\\_re\\_mi\\_ea/irq\\_prison\\_abuse](http://story.news.yahoo.com/news?tmpl=story&u=/ap_on_re_mi_ea/irq_prison_abuse).

Limburg principles on the implementation of the International Covenant on Economic, Social and Cultural Rights (1987) UN Document symbol E/CN.4/1987/17, Annex.

Liotta, P.H. (2002) "Boomerang effect: the convergence of national and human security", *Security Dialogue* 33 (4): 473-488.

Martin, David L. (1997) "The Limburg Principles turn ten: an impact assessment", *Studie en Informaticentrum Mensenrechten* (SIM) Special No. 20. Urecht Studie en Informaticentrum Mensenrechten. Available from: <http://www.uu.nl/content/20-09.pdf>.

Meeron, Theodor (1984) *Human rights in International Law: Legal and Policy Issues*, Oxford: Clarendon Press.

New Internationalist (2001) Health: The facts, January/February. Available from: <http://www.newint.org/>.

Office of the United Nations High Commissioner for Human Rights (OHCHR) (1990) General Comment No. 3, The Nature of States Parties Obligations, article 2, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights. Available from: <http://>

[www.unhcr.ch/files/doc.nsf/\(Symbol\)/94bdbaf59b43ad24c12563ed0052b664](http://www.unhcr.ch/files/doc.nsf/(Symbol)/94bdbaf59b43ad24c12563ed0052b664).

Ogata, Sadako and Johan Cels (2003) Global Insights: Human Security - Protecting and Empowering the People, *Global Governance* 9: 273-282.

Ravindran, D.J. (1998) *Human Rights Praxis: A Resource Book for Study, Action and Reflection*, Bangkok: The Asian Forum for Human Rights and Development.

Robles, Jojo (2004) "Predatory Profiteering", *The Manila Standard*, April 26.

Sani, Shehu (2003) "US Actions Send a Bad Signal to Africa, Inspiring Intolerance", *International Herald Tribune*, 15 September.

Steiner, Henry J. and Philip Alston (1996) *International Human Rights in Context: Law, Politics, Morals*, Oxford: Oxford University Press.

Task Force Detainees of the Philippines (TFDP) (2003) GMA's "Strong Republic": Building a Culture of Impunity: Human Rights under the Arroyo government. Available from: <http://www.tfdp.org/publication/hstst2003b.pdf>.

Thesis, Joachim, ed. (2004) *Promoting Rights-based Approaches: Experiences and Ideas from Asia and the Pacific*, Bangkok, Thailand: Save the Children Sweden.

United Nations Commission on Human Security (UNCHS) (2003) *Human Security Now: Protecting and Empowering People*, New York: Commission Human Security.

United Nations Economic and Social Commission for Asia and Pacific (UNESCAP) (2003) Global and regional economic developments: Implications and prospects for the ESCAP region. Available from: [http://www.unescap.org/pdd/publications/survey2003/Survey03\\_2.pdf](http://www.unescap.org/pdd/publications/survey2003/Survey03_2.pdf)

United Nations Economic And Social Council (UNESCO), Sub-Commission on the Promotion and Protection of Human Rights (SCP/PHR) (1999) The realization of economic, social and cultural rights: Globalization and its impact on the full enjoyment of human rights, Preliminary report submitted by J. Oloka-Onyango and Deepika Udagana, in accordance with Sub-Commission resolution 1999/8. Available from: [http://www.unhcr.ch/Huridocda/Huridocda.nsf/\(Symbol\)/ECN.4.Sub.2.2001.13](http://www.unhcr.ch/Huridocda/Huridocda.nsf/(Symbol)/ECN.4.Sub.2.2001.13).

(2001) The Impact of the Agreement on Trade-related Aspects of Intellectual Property Rights on Human Rights, Report of the

High Commissioner. Available from: [http://www.unhcr.ch/Huridocda/Huridocda.nsf/\(Symbol\)/ECN.4.Sub.2.2001.13.En?OpenDocument](http://www.unhcr.ch/Huridocda/Huridocda.nsf/(Symbol)/ECN.4.Sub.2.2001.13.En?OpenDocument).

United Nations Economic and Social Council (UNESCO) (1999) General Comment No. 12, The Right to Adequate Food, article 11 of the International Covenant on Economic, Social and Cultural Rights. Available from: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/3d02758c707031d58025677f003b73b97](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/3d02758c707031d58025677f003b73b97).

(2000) General Comment No. 14, The Right to the Highest Attainable Standard of Health, article 12 of the International Covenant on Economic, Social and Cultural Rights. Available from: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/40d009901358b0e2c1256915005090be](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be).

(2002) General Comment No. 15, The Right to Water, articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights. Available from: [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a4025044f331/154584d1bbd713fc1256cc400389e94/\\$FILE/GO340229.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a4025044f331/154584d1bbd713fc1256cc400389e94/$FILE/GO340229.pdf).

Vienna declaration and programme of action (1993) Available from: [http://www.unhcr.ch/huridocda/huridocda.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhcr.ch/huridocda/huridocda.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument).

Yoong, Sean (2003) "Malaysia Slams Criticism of Security Law Allowing Detention Without Trial", Associated Press, 9 September.



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A social worker by training, Ms. Serrano was part of the team that drafted the UN Manual on Human Rights and Social Work and was a pioneer in the establishment of the Human Rights Commission of the International Federation of Social Workers. She also coordinated and led various human rights missions and represented the Philippines and the Asia-Pacific region in various world events. She is currently the Coordinator for Asia and the Pacific of the Coalition for the International Criminal Court (CICC), the first permanent and independent international criminal court that will try serious crimes such as genocide, war crimes, crimes against humanity and the crime of aggression.

Ms. Serrano is also a consultant of FORUM-ASIA, a Bangkok-based regional network of more than 30 organizations from 20 different countries in Asia. She has written reports on the human rights conditions in Burma, Cambodia, Indonesia, East Timor, the Philippines and other Asian countries. Ms. Serrano has received numerous awards for her significant contributions to social work, human rights, development, peace and related concerns.

### MAX DE MESA

A human rights activist, De Mesa has extensive experience as an educator and organizer among grassroots communities, church people, youth, professionals and the academe. He has also done advocacy work for the environment and for peace, and has taken up several advocacies for people in very difficult situations, such as those in East Timor, Myanmar, and Tibet. Currently, he is a re-elected Board Member of the Task Force Detainees of the Philippines (TFDP), the Chairperson of the Philippine Alliance of Human Rights Advocates (PAHRA) and an Advisor to the Executive Committee of FORUM-ASIA, a regional human rights organization.

De Mesa undertook four years of theoretical studies and later obtained a Master of Arts degree, major in philosophy. He also had formal studies in the field of human rights at the Institute of Social Studies, The Hague, and a diplomatic course given by the University of New South Wales in Sydney, Australia.



## CHAPTER 2

### International and National Institutions on Human Rights

#### THE UNITED NATIONS HUMAN RIGHTS SYSTEM\*

##### Introduction

The United Nations (UN) has created a global structure for protecting human rights based largely on its Charter, non-binding declarations, legally binding treaties, and on various activities aimed at advancing democracy and human rights throughout the world.

The UN often finds it necessary to define rights in a cautious manner, as it is host to an extremely diverse group of member states with varying economic, social, cultural and political histories. Subsequently, the UN must accommodate these differences in its mechanisms for protecting the human rights it has outlined in treaties and declarations. Thus, these methods may be less substantive or lack in strict enforcement as compared to those of regional institutions. Broad agreements allow the UN to accommodate a spectrum of different viewpoints. The UN thus affects more nations and many more individuals than any regional institution could.

The UN's system of human rights protection has three main components: first, it establishes international standards through its Charter, legally binding treaties, non-binding declarations, agreements, and documents; next, it has mandates, Special Rapporteurs and experts, and groups such as working groups, committees and treaty bodies, to work in various manners for the promotion and protection of human rights; and finally,

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\* <http://www.hrea.org/learn/guides/UN.html>, [accessed 19 September 2005]

it offers technical assistance through the Voluntary Fund for Advisory Services and Technical Assistance in the field of Human Rights.

## History

International legal agreements and organizations predate the formation of the United Nations. At the International Peace Conference in The Hague in 1899, over 25 nations met for ten weeks to codify the laws of war, both on land and at sea. In addition to this monumental agreement, they also formulated instruments for peaceful crisis settlement and war prevention. This formal statement on the desirability of international peace laid the foundation for such organizations as the League of Nations and the United Nations.

Twenty years later, the League of Nations was founded. At the Treaty of Versailles in 1919, the victors of the First World War convened to negotiate a peace settlement. At this conference, the League, the UN's predecessor, was formed "to promote international cooperation and to achieve peace and security" throughout the world. Member states agreed not to go to war with one another without first submitting complaints to any offending state; and for offending states who were not members of the League, its members pledged not to go to war without an enquiry to the state. The League had originally been proposed by the president of the United States (US), Woodrow Wilson, but domestic pressure prevented the US from ever joining. The League of Nations lasted only until 1946; it dissolved after it failed to prevent the outbreak of World War II.

The trauma and violence of World War II (WWII) inspired the Allied Nations to try to establish a peacekeeping organization for the prevention of the recurrence of such horrors. On June 12, 1941, a preliminary move toward the establishment of the United Nations was taken with the signing of the Inter-Allied Declaration. Signed in London, the Inter-Allied

Declaration pledged that the Allied powers would "work together, with other free peoples, both in war and in peace."

Two months later, President Franklin Delano Roosevelt of the United States and Prime Minister Winston Churchill of the United Kingdom agreed upon a doctrine upon which to base international cooperation. The two main principles behind the UN, the establishment of both world peace and global security, are found in the Atlantic Charter. Roosevelt and Churchill signed this document while on board the HMS Prince of Wales on August 14, 1941. The signing signaled that the Allied Powers intended to form a stronger, more effective organization than the League of Nations had proven to be.

On January 1, 1942, representatives from the 26 Allied nations gathered in Washington, D.C. to sign the Declaration by United Nations. This document reaffirmed the goals set by the Atlantic Charter. It also first contained the term "United Nations", which had been suggested by President Roosevelt.

In 1943, two conferences were held during which nations recognized that the goals set forth in the Declaration by United Nations regarding international peace and security should be upheld within an international organization. The governments of the Soviet Union (USSR), the UK, the US and China signed such an agreement to this end in Moscow on October 30; leaders of the US, the USSR and the UK renewed this intention at Teheran on December 1, 1943.

From these agreements, leaders from the United States, the United Kingdom, the Soviet Union and China met for several months in the fall of 1944 in Washington, D.C., to determine the goals, structure, and methods of functioning for the United Nations. These meetings, held between September 21 and October 7, became known as the Dumbarton Oaks Conference.

On February 11, 1945, President Roosevelt, Prime Minister Churchill and Premier Joseph Stalin met at Yalta and announced their resolution to form "a general



international organization to maintain peace and security."

The San Francisco Conference of 1945 propelled the United Nations into reality. On April 25, delegates from 50 nations across the globe gathered in San Francisco, where they negotiated and drew up the 111-article Charter of the United Nations; the Charter was then unanimously adopted on June 25 and signed on June 26. Poland was not represented at the conference, but soon signed the Charter to become the 51st and last original member state.

The Charter's preamble states the purpose in founding such an institution: "We, the peoples of the United Nations, determined...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small..." The Charter itself includes the following goals: "...To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion..."

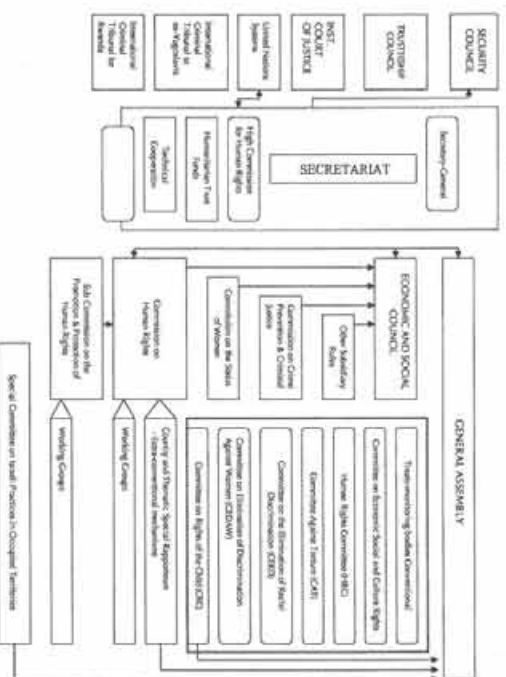
The United Nations officially became an institution with the ratification of the UN Charter on October 24, 1945. From then on, it quickly became an active international body. On January 10, 1946, the first General Assembly met at Westminster, London. There were 51 nations represented at this first meeting. One week later, on January 17, the Security Council first met, also in London. The following week, on January 24, the General Assembly adopted its first resolution, focusing on peaceful uses of atomic energy and the elimination of weapons of mass destruction. February 1 of that year saw the appointment of the first Secretary-General, Trygve Lie, from Norway. The UN Headquarters were first established in New York City on October 24, 1949.

## Main Bodies of the United Nations

The United Nations is composed of six major bodies: the General Assembly, the Secretariat, the Security

Council, the International Court of Justice, the Trusteeship Council and the Economic and Social Council. Although the United Nations was divided into these six spheres, they are of unequal size (some possess many subsidiary bodies and committees while others have very few), status (some are quite powerful while others have become almost obsolete), and relevance to human rights (some focus extensively on the issue while others bear little or no relevance for the protection and promotion of human rights).

Figure 1. UN HUMAN RIGHTS SYSTEM



General Assembly

The General Assembly is the legislative body of the UN. It currently consists of 191 member states, all of which must take part in its sessions and none of which may have more than five representatives. The General Assembly has established Permanent Committees, such as the seven Main Committees, the Procedural Commissions and the Permanent Commissions, that meet between General Assembly sessions. It is also responsible for appointing the Secretary-General, upon recommendation from the Security Council, to a renewable five-year term.



### *Secretariat*

The Secretariat is headed by the UN Secretary General, who is recommended by the Security Council and then appointed to a five-year term by the General Assembly. It is in charge of carrying out programs designed by other branches of the United Nations, such as peacekeeping missions, international dispute mediation, and studying economic, cultural, human rights, or social trends. It also handles administrative details, such as speech and documents translations, UN news and information releases, and international conference co-ordinations. The Secretariat hosts around 9,000 staff members.

### *Security Council*

The Security Council possesses the power to draft resolutions providing for the use of force against states, with an emphasis on non-violent conflict resolution and preventative measures. In order to pass a resolution permitting the use of arms against a state, it must gain at least nine "yea" votes from its fifteen members, with no vetoes. Only its permanent members hold veto power. Its composition was established in the UN Charter, and consists of five permanent members: China, France, Russia, the United Kingdom and the United States. Additionally, ten non-permanent members who are elected to two year-terms, serve on the Council. Non-members may participate in hearings and meetings, but may not vote. The Security Council is an important branch of the UN, developed for the maintenance of peace and security in the world.

### *International Court of Justice*

The International Court of Justice (ICJ), the judicial branch of the UN, is based in the Hague, the Netherlands, and was established in 1945 by the Charter of the United Nations. All states that have signed the UN Charter are members of the ICJ. Its jurisdiction extends to international conflicts, with the exception of political

ones. Its responsibilities include giving opinions on concrete topics, ruling on cases, and clarifying international legal norms.

The ICJ is the latest step in the continuing evolution of international courts. The first such court, the Permanent Court of Arbitration, was founded in 1899 and still exists today. The Permanent Court of International Justice was created by the League of Nations and existed between 1922 and 1946. It served as the model on which the International Court of Justice was based.

### *Economic and Social Council (ECOSOC)*

The Economic and Social Council (ECOSOC) makes recommendations to the General Assembly on human rights issues. It reviews the reports submitted by the Commission on Human Rights and submits the amended versions to the General Assembly. ECOSOC is composed of 54 members who serve three-year terms and meet twice a year. Additionally, it oversees several committees and commissions, such as the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights, the Commission on the Status of Women and the Commission on Crime Prevention and Criminal Justice, as well as UN specialized agencies, such as the International Labor Organization (ILO) and the World Health Organization (WHO).

### *Trusteeship Council*

This council was originally established to preside over the so-called "dependent areas" within the international Trusteeship System, under Article 75 of the UN Charter. However, the goals for and tasks of the Council have largely been fulfilled, and it is therefore now mostly obsolete. Currently, the Trusteeship Council only meets if and when the situation requires it.



## Charter-Based Mechanisms for Human Rights Protection and Promotion

The type of protection provided by the United Nations on issues of human rights is based on either the Charter or treaty mechanisms. Those mechanisms based on the UN Charter include the Universal Declaration of Human Rights, the Commission on Human Rights, and the Sub-Commission on the Promotion and Protection of Human Rights.

### *Universal Declaration on Human Rights*

The Universal Declaration of Human Rights (UDHR) is one of the first international documents to be based on the idea that rights are guaranteed to each human being. Most previous international declarations and treaties were based on the idea of positivism, whereby rights are only recognized once they have been set forth in national legislation. Like the UN itself, the UDHR was written with the aim of establishing world peace by promoting human rights. Originally, the UDHR brought together 58 distinct geographic, cultural and political backgrounds in the formation of one universal document. Although the UDHR is not legally binding, it has created international human rights standards that are codified in various international treaties.

The Universal Declaration of Human Rights was drafted between January 1947 and December 1948. Its text was composed by the then eight-member Commission on Human Rights headed by Eleanor Roosevelt, and sought to include the whole spectrum of human rights from cultural, social and economic to civil and political rights. Following over 1,400 votes modifying the document's text, the UN General Assembly unanimously passed the Declaration on December 10, 1948, with eight abstentions to the vote coming from Belarus, Czechoslovakia, Poland, Saudi Arabia, South Africa, the Soviet Union, Ukraine, and Yugoslavia.

The UDHR consists of 30 articles specifying basic rights guaranteed to each individual. The first two articles establish the document's premise, that all humans share

universal equality, and that this equality is based on the fundamental dignity bestowed upon humanity. This equality of human dignity translates to universality of human rights. Included in the notion of universality is the idea that these rights are automatically extended to everyone and may not be denied for any reason or because of any action an individual may commit. Thus, Article 1 states: "All human beings are born equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Article 2 continues: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Articles 3 through 21 specify civil and political rights. In these articles, rights set forth include the right to life, liberty, a fair trial, free speech, privacy, of personal security, and of movement, as well as freedom from slavery, torture, and arbitrary arrest.

Articles 22 through 27 provide for economic, social and cultural rights. These rights are specified as an indispensable aspect of an individual's life, being necessary for one's dignity and personal development, and include economic rights such as the right to social security, economic on work-related rights, fair payment and leisure; social rights such as the right to an adequate standard of health, well-being and education; and cultural rights such as the right to participate in cultural life.

Finally, Articles 28 through 30 establish a general framework to provide for the enjoyment of human rights: the recognition of the right to a social and international system that promotes human rights; a statement that humans have obligations to the community along with fundamental rights; and a reminder that no state or individual may utilize the Declaration to promote goals contrary to the mission or goals of the UN.



#### *Commission on Human Rights*

Composed of 53 member states, the Commission on Human Rights is the Charter-based body that most directly deals with the area of human rights. It is assisted by the Sub-Commission on the Promotion and Protection of Human Rights, individual experts, representatives, and Special Rapporteurs. The Commission on Human Rights meets for six weeks each year in Geneva, although it may also meet in majority-endorsed "Special Sessions" in order to provide the most expeditious manner of dealing with human rights abuses. In evaluating a situation, the Commission may choose to monitor a situation itself or may request for an outside body to do so. Its jurisdiction of human rights protection was expanded by ECOSOC in the 1970s to include the entire globe.

From its inception, the Commission has influenced international human rights standards by working to set as well as to enforce rights standards. It helped author the Universal Declaration of Human Rights in 1948. Since then, it has formed standards relating to the right to development, civil and political rights, economic, social and cultural rights, the elimination of racial discrimination, torture, the rights of the child and the rights of human rights defenders.

#### *Monitoring Human Rights*

The Commission on Human Rights also devotes much time to monitoring the implementation of the standards it has set. It may turn to any number of permanent or special procedures when examining a specific area of human rights. Its two permanent procedures are the 1503 Procedure and the 1235 Procedure; its special procedures include fact-finding missions, thematic mechanisms or mandates and advisory services.

The 1503 Procedure is a confidential procedure named after ECOSOC Resolution 1503 by which it was established. It is activated when the Commission receives a communication about a consistent pattern of gross

human rights violations. Violations considered under this procedure include genocide, apartheid, racial or ethnic discrimination, torture, forced mass migrations and mass imprisonment without a trial. The report of consistent gross human rights violations to the Commission may not be an anonymous one, yet does not require the consent of the state concerned for an investigation to take place. This regulation gives the Commission great leeway in deciding how to best approach a situation. Following its investigation, the Commission then decides what action to take. When a 1503 Procedure fails to stop a human rights violation it has investigated, the Commission on Human Rights may invoke the 1235 Procedure, under which it can hold an annual public debate about the gross violations of human rights in question. If this also fails to adequately affect the situation, the Commission may move to have ECOSOC pass a resolution condemning the violators. This public condemnation tarnishes the reputation of the leaders in the state in question and discredits their legitimacy as political elites.

Among the special procedures available to the Commission on Human Rights, **fact-finding missions** are a useful tool. In a fact-finding mission, an expert or group of experts studies the human rights situation and looks for violations in a given state with the purpose of gathering information for a 1503 or a 1235 procedure. However, a fact-finding mission may only occur with the consent of the state whose human rights record is being questioned. As of April 2003, 47 countries had extended standing invitations to the Thematic Special Procedures of the United Nations Commission on Human Rights to investigate human rights issues, meaning that the Commission may initiate a fact-finding mission to any one of those countries at any time. For all other nations, the Commission must first seek and gain approval before dispatching its experts to the country.

Another special procedure available to the Commission on Human Rights is a **thematic mechanism** or mandate. Working groups and/or Special Rapporteurs



investigate human rights violations and the problems they have caused on a multi-state level. Recently, there has been an increase in the number of Special Rapporteurs investigating human rights issues.

Lastly, the Commission on Human Rights offers advisory services to nations that request it. The Commission provides educational and informational assistance to states in order to help them observe a high level of human rights protection. Additionally, the Commission on Human Rights may request assistance from the Office of the High Commissioner for Human Rights in the form of seminars, training courses, and clinics as well as advice from experts.

#### *Sub-Commission on the Promotion and Protection of Human Rights*

The Sub-Commission was established by the Commission on Human Rights at its first meeting in 1947, and was titled the Sub-Commission on Prevention of Discrimination and Protection of Minorities. It serves as the main subsidiary body to the Commission on Human Rights.

The Sub-Commission is comprised of 26 member experts acting independently, without affiliation to their state of origin, though they are elected by the Commission proportionally according to geographical population distribution. Presently, member experts are divided as follows: seven from Africa, six from Western Europe and other States, five from Asia, five from Latin America and three from Eastern Europe. Each member has one alternate; half the members and their alternates are elected every two years and each serves for a term of four years. The Sub-Commission meets for three weeks each year in Geneva; government officials, staff of UN specialized agencies and NGO observers may also attend their meetings.

The Sub-Commission's mission is to undertake studies under the guidance of the UDHR and to make recommendations to the Commission on Human Rights concerning the prevention of discrimination of any kind

relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities. The Sub-Commission also undertakes work assigned to it by the Commission or ECOSOC, and distributes these assignments between its six working groups: the Working Group on Communications (which considers complaints regarding a consistent pattern of gross and verifiable violations of human rights within the scope of communications, together with any existing replies from governments), the Working Group on Contemporary Forms of Slavery, the Working Group on Indigenous Populations, the Working Group on Minorities, the Working Group on Administration of Justice and the Working Group on Transnational Corporations.

#### *High Commissioner for Human Rights*

The position of the High Commissioner for Human Rights was established by the General Assembly of the United Nations in December 1993. The High Commissioner carries out the Secretary-General's "good offices" duties relating to human rights, and is accountable to the Economic and Social Council as well as the Secretary-General. The Commissioner holds the principal position of promoting human rights and dealing with human rights activities in the UN, and must also maintain dialogue with all member states on the subject of human rights. Responsibilities of the High Commissioner include crisis management, prevention and early warning of abuses, assistance to states in periods of political transition, promotion of substantive rights to governments, and coordination and rationalization of human rights programs.

The Commissioner is assisted by a Deputy to the United Nations High Commissioner for Human Rights, a staff for dealing with substantive issues, and an administrative staff. The Deputy, who assists the Commissioner in fulfilling assignments, is the Officer-In-Charge when the Commissioner is absent. The policies of the High Commissioner are implemented by the Office



of the High Commissioner for Human Rights (OHCHR), whose main responsibility is "to protect and promote human rights for all." OHCHR fulfills its goals through a variety of activities, including emphasizing the significance of human rights globally and locally, providing education and resources regarding human rights, supporting human rights organs and treaty monitoring bodies, and responding to serious human rights violations.

The post of High Commissioner for Human Rights was first held by Mr. José Ayala-Lasso of Ecuador.

### **Treaty-Based Mechanisms for Human Rights Protection and Promotion**

International law takes precedence over the domestic law of a state. Thus, when a nation signs a treaty, it is pledging to adopt the provisions set forth within the treaty into the domestic law of a state. In this way, treaty-based mechanisms vary from Charter-based ones. Whereas the UN Charter's mechanisms are at times either not legally binding or require permission to be executed, treaties are backed by the norms regulating international law and are therefore legally binding.

International legal instruments take the form of a treaty (also called agreement, convention, protocol) which may be binding on the contracting states. When negotiations are completed, the text of a treaty is established as authentic and definitive and is "signed" to that effect by the representatives of states. There are various means by which a state expresses its consent to be bound by a treaty. The most common are ratification or accession. A new treaty is "ratified" by those states that have negotiated the instrument. A state which has not participated in the negotiations may, at a later stage, "accede" to the treaty. The treaty enters into force when a pre-determined number of states have ratified or acceded to the treaty.

When a state ratifies or accedes to a treaty, that state may make reservations to one or more articles of the treaty, unless reservations are prohibited by the treaty.

Reservations may normally be withdrawn at any time. In some countries, international treaties take precedence over national law; in others, a specific law may be required to give an international treaty, although ratified or acceded to, the force of a national law. Practically all states that have ratified or acceded to an international treaty must issue decrees, amend existing laws or introduce new legislation in order for the treaty to be fully effective on the national territory.

The UN currently has seven human rights treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

Each of these seven human rights treaties has a monitoring body composed of independent experts who examine the reports that signatory nations submit under the treaty. These committees are also in charge of issuing "concluding observations/comments", where they summarize their concerns about certain states and also give recommendations for the future.

Four of the treaty committees have mechanisms to deal directly with individual complaints of human rights violations under their respective treaties. These four bodies are: the Human Rights Committee, for the ICCPR; the Committee on the Elimination of Racial Discrimination, for the CERD; the Committee on the Elimination of all forms of Discrimination against Women, for CEDAW; and the Committee against Torture, for CAT. Strict regulations exist regarding when an individual may formally issue a complaint to one of the monitoring bodies. All domestic options for settling the



violation must have been previously exhausted. Additionally, the individual issuing the complaint must be under the jurisdiction of a state that is a party to the relevant treaty. No complaint may be made anonymously; it must come from either the victim, a representative of the victim, or, in rare circumstances in which it is impossible for either of these people to complain, a third, non-anonymous party may issue a complaint. The event in question must have occurred on or after the later date of either the treaty's entrance into force or the date the state in question signed the treaty.

#### *International Covenant on Economic, Social and Cultural Rights (ICESCR)*

This International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the United Nations in 1966 and entered into force one decade later, in 1976. Along with the International Covenant on Civil and Political Rights, the amount of time that it took the ICESCR to enter into force may be partly attributed to the Cold War, in which Communist regimes, who advocated for economic, social and cultural rights, stood squarely against Western capitalist democracies, who embraced the civil and political rights codified in the International Covenant on Civil and Political Rights. The ICESCR is monitored by the Committee on Economic, Social and Cultural Rights.

#### *Committee on Economic, Social and Cultural Rights*

The Covenant itself did not provide for the creation of a monitoring body, so in the early days of ICESCR, states that had ratified the treaty reported to a working group of ECOSOC. In 1986, the Committee on Economic, Social and Cultural Rights (CESCR) took over the role as an independent expert committee to monitor the implementation of the Covenant. Currently, the Committee does not have a mechanism for processing individual complaints, although in 1996, CESCR sent to the Commission on Human Rights a draft of a proposed

optional protocol that would provide for this kind of complaints procedure. It meets three times a year in Geneva.

#### *International Covenant on Civil and Political Rights (ICCPR)*

The International Covenant on Civil and Political Rights, like the ICESCR, was adopted by the UN in 1966, but did not enter into force until 1976. Also like the ICESCR, the ICCPR saw a great deal of delay in its ratification due to the Cold War conflicts. These two treaties were signed separately because of the thought that political and civil rights could and must be guaranteed from the moment a nation signs on to the Covenant listing them, but that, while it was desirable for the same to be true of economic, social and cultural rights, it was not feasible. Implementation of social and economic rights was expected to take much time and thus could not be forced upon a nation merely because it has ratified the Covenant.

This concern is recognized in the respective second articles of each Covenant: In Article 2, paragraph 1 of the ICCPR, the Covenant obliges a state "...to respect and to ensure to all individuals...the rights recognized in the present Covenant." Meanwhile, a state "undertakes to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant...", also according to Article 2, paragraph 1. The ICCPR is monitored by the Human Rights Committee.

These two treaties account for most of the provisions listed under the Universal Declaration of Human Rights; further, they make the provisions binding for those nations who are parties to the covenants. The two covenants, along with their optional protocols and the Universal Declaration of Human Rights, are known as the International Bill of Human Rights.

#### *Human Rights Committee*

The Human Rights Committee was established to ensure that the rights listed under the ICCPR were



protected. It is composed of 18 elected representatives, who serve four-year terms as independent and not as representatives of their state of origin, and is based in Geneva. Its role is comprised of four main duties: to review reports submitted by states on their domestic actions taken to comply with the treaty; to consider information submitted from one member state accusing another member state of violating the treaty in some manner; to consider individuals' complaints against states that have signed the treaty, as well as reports written also by NGO; and to issue "General Comments".

Each member state of the ICCPR is required to submit a report to the Human Rights Committee each year "on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights" (ICCPR Article 40). These reports must contain both a general and a specific component to them. The general aspect of the report must include data and statistics on the nations' frameworks in place that protect the rights listed in the treaty, whereas the report's specific aspect must include information addressing each article in the ICCPR, as well as information about court rulings and the extent to which rights are being enjoyed in the member state.

Member states may report on other member states that are not abiding by the treaty's provisions. If such a circumstance were to arise, the report would first be sent to the offending state. Then, if it is not addressed adequately by the state, it could be sent to the Human Rights Committee for review. Despite the availability of this mechanism, it has never been utilized.

In the case of the ICCPR, the state in question must be a party to the treaty's optional protocol, which allows for the registering of individual complaints. If all these preconditions are met, the complaint proceeds through three stages: the registration of the complaint, an examination of whether or not the complaint satisfactorily meets the preconditions, and a communication on whether the complaint falls under the ICCPR and may therefore be given consideration. When

the Human Rights Committee considers a complaint, the Committee will submit "views" on the issue in an annual publication. Although these views may condemn a government or state sector, the Committee has no means of sanctioning the guilty party or of enforcing its views.

#### *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*

The International Convention on the Elimination of All Forms of Racial Discrimination was adopted in 1965 and entered into force in 1969. It seeks to eliminate all forms of racial discriminations, and is monitored by the Committee on the Elimination of Racial Discrimination.

#### *Committee on the Elimination of Racial Discrimination*

The Committee on the Elimination of Racial Discrimination (CERD) exists to monitor state parties to the CERD. It has 18 independent experts who are elected to CERD by state parties to the Convention. They meet in Geneva each year for two three-week sessions.

CERD's four main duties are the same as the Human Rights Committee's: to review reports submitted by states on their domestic actions taken to comply with the treaty; to consider information submitted from one member state accusing another member state of violating the treaty in some manner; to consider individuals' complaints against states that have signed the treaty; and to issue written "General Comments."

#### *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*

This Convention on the Elimination of All Forms of Discrimination against Women was adopted in 1979 and entered into force in 1981. It focuses on the areas of education, employment, health, marriage, and the family as each area relates specifically to women. CEDAW calls for the elimination of discrimination against women within society as well as the adoption of legislation to further women's rights. It is monitored by the Committee



on the Elimination of all forms of Discrimination against Women.

#### Committee on the Elimination of all forms of Discrimination against Women

The Committee on the Elimination of all forms of Discrimination against Women (the CEDAW Committee) monitors the CEDAW treaty. It consists of 23 independent experts who are elected by those states that are parties to the Convention. It is one of the four monitoring committees that may undertake confidential inquiries into individual complaints.

As the Committee on the Elimination of Racial Discrimination and the Human Rights Committee, the CEDAW Committee has four main duties: to review reports submitted by states on their domestic actions taken to comply with the treaty; to consider information submitted from one member state accusing another member state of violating the treaty in some manner; to consider individuals' complaints against states that have signed the treaty; and to issue Committee written "General Comments" on each state's compliance with the treaty, taking into account reports written also by NGOs, to present to the Secretary General.

#### *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted in 1984 and entered into force in 1987. Among other provisions, it bans torture and rape as weapons during wartime. It is monitored by the Committee against Torture.

#### Committee against Torture

The Committee Against Torture exists to monitor the Convention Against Torture treaty. Its membership includes ten independent experts elected by parties to the Convention. The Committee meets twice a year in

Geneva for two to three weeks at a time, and submits an annual report to the UN General Assembly.

The Committee Against Torture shares four of its five main duties with the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the CEDAW Committee. Its mission includes: reviewing reports submitted by states on their domestic actions taken to comply with the treaty; considering information submitted from one member state accusing another member state of violating the treaty in some manner; considering individuals' complaints against states that have signed the treaty; issuing Committee written "General Comments" on each state's compliance with the treaty, taking into account reports written also by NGOs, to present to the Secretary General. In addition to these four shared goals, CAT also investigates into allegations of general systematic forms of torture.

#### *Convention on the Rights of the Child (CRC)*

The Convention on the Rights of the Child was adopted in November of 1989 and entered into force less than a year later, in September of 1990. It is the UN's most universally ratified human rights convention. It protects children from economic and sexual exploitation, among other things, and is monitored by the Committee on the Rights of the Child.

#### Committee on the Rights of the Child

The Committee on the Rights of the Child monitors the Convention on the Rights of the Child. While the Committee engages in many of the same practices as do other committees, there is no individual complaints mechanism associated with the Convention, nor is there one associated with either of its two optional protocols, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. However, the Committee still examines state reports submitted and makes general

recommendations to the General Assembly on state parties and their compliance with the Convention.

*International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*

The latest of the UN's human rights treaties, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, was adopted in 1990 and entered into force July 1, 2003. It is monitored by the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families.

*Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families*

The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families monitors the treaty under the same name. It is composed of 10 members, and its roles are to examine state reports submitted and to make general recommendations. Under the treaty, it will be possible to address individual complaints once a minimum of ten states have agreed to the practice.



## INTRODUCTION ON INTERNATIONAL HUMAN RIGHTS INSTRUMENT\*

### Background

The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

Human rights had already found expression in the Covenant of the League of Nations, which led, *inter alia*, to the creation of the International Labour Organization. At the 1945 San Francisco Conference, held to draft the Charter of the United Nations, a proposal to embody a "Declaration on the Essential Rights of Man" was put forward but was not examined because it required more detailed consideration than was possible at the time. The Charter clearly speaks of "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" (Art. 1, para. 3). The idea of promulgating an "international bill of rights" was also considered by many as basically implicit in the Charter.

The Preparatory Commission of the United Nations, which met immediately after the closing session of the San Francisco Conference, recommended that the Economic and Social Council should, at its first session, establish a commission for the promotion of human rights as envisaged in Article 68 of the Charter. Accordingly, the Council established the Commission on Human Rights early in 1946.

\* Fact Sheet No. 2 (Rev. 1) The International Bill of Human Rights. Available from: <http://www.unhcr/html/menu6/2/fs2.htm> [accessed 15 September 2005].



At its first session in 1946, the General Assembly considered a draft Declaration on Fundamental Human Rights and Freedoms and transmitted it to the Economic and Social Council "for reference to the Commission on Human Rights for consideration . . . in its preparation of an international bill of rights" (resolution 43 (I)). The Commission, at its first session early in 1947, authorized its officers to formulate what it termed "a preliminary draft International Bill of Human Rights." Later, the work was taken over by a formal drafting committee, consisting of members of the Commission from eight States, selected with due regard for geographical distribution.

### Towards the Universal Declaration

In the beginning, different views were expressed about the form the bill of rights should take. The Drafting Committee decided to prepare two documents: one in the form of a declaration, which would set forth general principles or standards of human rights; the other in the form of a convention, which would define specific rights and their limitations. Accordingly, the Committee transmitted to the Commission on Human Rights draft articles of an international declaration and an international convention on human rights. At its second session in December 1947, the Commission decided to apply the term "International Bill of Human Rights" to the series of documents in preparation and established three working groups: one on the declaration, one on the convention (which it renamed "covenant") and one on implementation. The Commission revised the draft declaration at its third session, in May/June 1948, taking into consideration comments received from Governments. It did not have time, however, to consider the covenant or the question of implementation. The declaration was therefore submitted through the Economic and Social Council to the General Assembly, meeting in Paris.

By its resolution 217 A (III) of 10 December 1948, the General Assembly adopted the Universal Declaration of Human Rights as the first of these projected instruments.

### Towards the International Covenants

On the same day that it adopted the Universal Declaration, the General Assembly requested the Commission on Human Rights to prepare, as a matter of priority, a draft covenant on human rights and draft measures of implementation. The Commission examined the text of the draft covenant in 1949 and the following year it revised the first 18 articles, on the basis of comments received from Governments. In 1950, the General Assembly declared that "the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent" (resolution 421 (V), sect. E). The Assembly thus decided to include in the covenant on human rights economic, social and cultural rights and an explicit recognition of the equality of men and women in related rights, as set forth in the Charter. In 1951, the Commission drafted 14 articles on economic, social and cultural rights on the basis of proposals made by Governments and suggestions by specialized agencies. It also formulated 10 articles on measures for implementation of those rights under which States parties to the covenant would submit periodic reports. After a long debate at its sixth session in 1951/1952, the General Assembly requested the Commission "to draft two Covenants on Human Rights, . . . one to contain civil and political rights and the other to contain economic, social and cultural rights" (resolution 543 (VI), para. 1). The Assembly specified that the two covenants should contain as many similar provisions as possible. It also decided to include an article providing that "all peoples shall have the right of self-determination" (resolution 545 (VI)).

The Commission completed preparation of the two drafts at its ninth and tenth sessions in 1953 and 1954. The General Assembly reviewed those texts and decided to give the drafts the widest possible publicity in order that Governments might study them thoroughly and that public opinion might express itself freely. It recommended that its Third Committee start an article-



by-article discussion of the texts at its tenth session in 1955. Although the article-by-article discussion began as scheduled, it was not until 1966 that the preparation of the two covenants was completed.

The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights were adopted by the General Assembly by its resolution 2200 A (XXI) of 16 December 1966. The first Optional Protocol to the International Covenant on Civil and Political Rights, adopted by the same resolution, provided international machinery for dealing with communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

The Universal Declaration of Human Rights was adopted and proclaimed by the General Assembly

*as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.*

The article thus defines the basic assumptions of the Declaration: that the right to liberty and equality is man's birthright and cannot be alienated; and that, because man is a rational and moral being, he is different from other creatures on earth and therefore is entitled to certain rights and freedoms which other creatures do not enjoy.

Article 2, which sets out the basic principle of equality and non-discrimination as regards the enjoyment of human rights and fundamental freedoms, forbids "distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 3, the first cornerstone of the Declaration, proclaims the right to life, liberty and security of person

- a right essential to the enjoyment of all other rights. This article introduces articles 4 to 21, in which other civil and political rights are set out, including: freedom from slavery and servitude; freedom from torture and cruel, inhuman or degrading treatment or punishment; the right to recognition everywhere as a person before the law; the right to an effective judicial remedy; freedom from arbitrary arrest, detention or exile; the right to a fair trial and public hearing by an independent and impartial tribunal; the right to be presumed innocent until proved guilty; freedom from arbitrary interference with privacy, family, home or correspondence; freedom of movement and residence; the right of asylum; the right to a nationality; the right to marry and to found a family; the right to own property; freedom of thought, conscience and religion; freedom of opinion and expression; the right to peaceful assembly and association; and the right to take part in the government of one's country and to equal access to public service in one's country.

Article 22, the second cornerstone of the Declaration, introduces articles 23 to 27, in which economic, social and cultural rights - the rights to which everyone is entitled "as a member of society" - are set out. The article characterizes these rights as indispensable for human dignity and the free development of personality, and indicates that they are to be realized "through national effort and international cooperation". At the same time, it points out the limitations of realization, the extent of which depends on the resources of each State.

The economic, social and cultural rights recognized in articles 22 to 27 include the right to social security; the right to work; the right to equal pay for equal work; the right to rest and leisure; the right to a standard of living adequate for health and well-being; the right to education; and the right to participate in the cultural life of the community.

The concluding articles, articles 28 to 30, recognize that everyone is entitled to a social and international order in which the human rights and fundamental freedoms set forth in the Declaration may be fully



realized, and stress the duties and responsibilities which each individual owes to his community. Article 29 states that "in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." It adds that in no case may human rights and fundamental freedoms be exercised contrary to the purposes and principles of the United Nations. Article 30 emphasizes that no State, group or person may claim any right, under the Declaration, "to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth" in the Declaration.

#### *Importance and Influence of the Declaration*

Conceived as "a common standard of achievement for all peoples and all nations," the Universal Declaration of Human Rights has become just that: a yardstick by which to measure the degree of respect for, and compliance with, international human rights standards.

Since 1948, it has been, and rightly continues to be, the most important and far-reaching of all United Nations declarations, and a fundamental source of inspiration for national and international efforts to promote and protect human rights and fundamental freedoms. It has set the direction for all subsequent work in the field of human rights and has provided the basic philosophy for many legally binding international instruments designed to protect the rights and freedoms which it proclaims.

In the Proclamation of Teheran, adopted by the International Conference on Human Rights held in Iran in 1968, the Conference agreed that "the Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community." The Conference affirmed its faith in the principles set forth

in the Declaration, and urged all peoples and Governments "to dedicate themselves to [those] principles . . . and to redouble their efforts to provide for all human beings a life consonant with freedom and dignity and conducive to physical, mental, social and spiritual welfare."

In recent years, there has been a growing tendency for United Nations organs, in preparing international instruments in the field of human rights, to refer not only to the Universal Declaration, but also to other parts of the International Bill of Human Rights.

#### **International Covenants on Human Rights**

The preambles and articles 1, 3 and 5 of the two International Covenants are almost identical. The preambles recall the obligation of States under the Charter of the United Nations to promote human rights; remind the individual of his responsibility to strive for the promotion and observance of those rights; and recognize that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

Article 1 of each Covenant states that the right to self-determination is universal and calls upon States to promote the realization of that right and to respect it.

The article provides that "All peoples have the right of self-determination" and adds that "By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development." Article 3, in both cases, reaffirms the equal right of men and women to the enjoyment of all human rights, and enjoins States to make that principle a reality. Article 5, in both cases, provides safeguards against the destruction or undue limitation of any human right or fundamental freedom, and against misinterpretation of any provision of the Covenants as a means of justifying



infringement of a right or freedom or its restriction to a greater extent than provided for in the Covenants. It also prevents States from limiting rights already enjoyed within their territories on the ground that such rights are not recognized, or recognized to a lesser extent, in the Covenants.

Articles 6 to 15 of the International Covenant on Economic, Social and Cultural Rights recognize the rights to work (art. 6); to the enjoyment of just and favourable conditions of work (art. 7); to form and join trade unions (art. 8); to social security, including social insurance (art. 9); to the widest possible protection and assistance for the family, especially mothers, children and young persons (art. 10); to an adequate standard of living (art. 11); to the enjoyment of the highest attainable standard of physical and mental health (art. 12); to education (arts. 13 and 14); and to take part in cultural life (art. 15).

In its articles 6 to 27, the International Covenant on Civil and Political Rights protects the right to life (art. 6) and lays down that no one is to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7); that no one is to be held in slavery; that slavery and the slave-trade are to be prohibited; and that no one is to be held in servitude or required to perform forced or compulsory labour (art. 8); that no one is to be subjected to arbitrary arrest or detention (art. 9); that all persons deprived of their liberty are to be treated with humanity (art. 10); and that no one is to be imprisoned merely on the ground of inability to fulfill a contractual obligation (art. 11).

The Covenant provides for freedom of movement and freedom to choose a residence (art. 12) and for limitations to be placed on the expulsion of aliens lawfully in the territory of a State party (art. 13). It makes provision for the equality of all persons before the courts and tribunals and for guarantees in criminal and civil proceedings (art. 14). It prohibits retroactive criminal legislation (art. 15); lays down the right of everyone to recognition everywhere as a person before the law (art. 16); and calls for the prohibition of arbitrary or unlawful

interference with an individual's privacy, family, home or correspondence, and of unlawful attacks on his honour and reputation (art. 17).

The Covenant provides for protection of the rights to freedom of thought, conscience and religion (art. 18) and to freedom of opinion and expression (art. 19). It calls for the prohibition by law of any propaganda for war and of any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (art. 20). It recognizes the right of peaceful assembly (art. 21) and the right to freedom of association (art. 22). It also recognizes the right of men and women of marriageable age to marry and to found a family, and the principle of equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution (art. 23). It lays down measures to protect the rights of children (art. 24), and recognizes the right of every citizen to take part in the conduct of public affairs, to vote and to be elected, and to have access, on general terms of equality, to public service in his country (art. 25). It provides that all persons are equal before the law and are entitled to equal protection of the law (art. 26). It also calls for protection of the rights of ethnic, religious and linguistic minorities in the territories of States parties (art. 27).

Finally, article 28 provides for the establishment of a Human Rights Committee responsible for supervising implementation of the rights set out in the Covenant.

### Conditions

The Universal Declaration of Human Rights affirms that the exercise of a person's rights and freedoms may be subject to certain limitations, which must be determined by law, solely for the purpose of securing due recognition of the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Rights may not be exercised contrary to the purposes and principles of the United Nations, or if they are aimed at



destroying any of the rights set forth in the Declaration (arts. 29 and 30).

The International Covenant on Economic, Social and Cultural Rights states that the rights provided for therein may be limited by law, but only in so far as it is compatible with the nature of the rights and solely to promote the general welfare in a democratic society (art. 4).

Unlike the Universal Declaration and the Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights contains no general provision applicable to all the rights provided for in the Covenant authorizing restrictions on their exercise. However, several articles in the Covenant provide that the rights being dealt with shall not be subject to any restrictions except those which are prescribed by law and are necessary to protect national security, public order, or the rights and freedoms of others.

Certain rights, therefore, may never be suspended or limited, even in emergency situations. These are the rights to life, to freedom from torture, to freedom from enslavement or servitude, to protection from imprisonment for debt, to freedom from retroactive penal laws, to recognition as a person before the law, and to freedom of thought, conscience and religion.

The Covenant on Civil and Political Rights allows a State to limit or suspend the enjoyment of certain rights in cases of officially proclaimed public emergencies which threaten the life of the nation. Such limitations or suspensions are permitted only "to the extent strictly required by the exigencies of the situation" and may never involve discrimination solely on the ground of race, colour, sex, language, religion or social origin (art. 4). The limitations or suspensions must also be reported to the United Nations.

#### First Optional Protocol

The first Optional Protocol to the International Covenant on Civil and Political Rights enables the Human Rights Committee, set up under that Covenant,

to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant. Under article 1 of the Optional Protocol, a State party to the Covenant that becomes a party to the Protocol recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State of any of the rights set forth in the Covenant. Individuals who make such a claim, and who have exhausted all available domestic remedies, are entitled to submit a written communication to the Committee (art. 2).

Such communications as are determined to be admissible by the Committee (in addition to article 2, articles 3 and 5 (2) lay down conditions for admissibility) are brought to the attention of the State party alleged to be violating a provision of the Covenant. Within six months, that State must submit to the Committee written explanations or statements clarifying the matter and indicating the remedy, if any, that it may have applied (art. 4). The Human Rights Committee considers the admissible communications, at closed meetings, in the light of all written information made available to it by the individual and the State party concerned. It then forwards its views to the State party and to the individual (art. 5). A summary of the Committee's activities under the Optional Protocol is included in the report which it submits annually to the General Assembly through the Economic and Social Council (art. 6).

#### Second Optional Protocol

The Second Optional Protocol to the International Covenant on Civil and Political Rights, which aims at the abolition of the death penalty, was adopted by the General Assembly in its resolution 44/128 of 15 December 1989. Under its article 1, no one within the jurisdiction of a State party to the Protocol may be executed.

Under article 3 of the Protocol, States parties must include in the reports which they submit to the Human

Rights Committee information on measures taken to give effect to the Protocol.

Article 5 of the Second Optional Protocol provides that, with respect to any State party to the first Optional Protocol, the competence of the Human Rights Committee to receive and consider communications from individuals subject to that State's jurisdiction shall extend to the provisions of the Second Optional Protocol, unless the State party concerned has made a statement to the contrary at the moment of ratification or accession.

Under article 6, the provisions of the Second Optional Protocol apply as additional provisions to the Covenant.

### Entry into Force of the Covenants and the Optional Protocols

The International Covenant on Economic, Social and Cultural Rights entered into force on 3 January 1976, three months after the date of deposit with the Secretary-General of the thirty-fifth instrument of ratification or accession, as provided in article 27. As of 30 September 1995, the Covenant had been ratified or acceded to by 132 States.

The International Covenant on Civil and Political Rights entered into force on 23 March 1976, three months after the date of deposit with the Secretary-General of the thirty-fifth instrument of ratification or accession, as provided in article 49. As of 30 September 1995, the Covenant had also been ratified or acceded to by 132 States.

On the same date, 44 States parties to the International Covenant on Civil and Political Rights made the declaration under its article 41, recognizing the competence of the Human Rights Committee "to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations" under the Covenant. The provisions of article 41 entered into force on 28 March 1979 in accordance with paragraph 2 of that article.

The first Optional Protocol to the International Covenant on Civil and Political Rights entered into force

simultaneously with the Covenant, having received the minimum 10 ratifications or accessions required. As of 30 September 1995, 85 States parties to the Covenant had also become parties to the first Optional Protocol.

The Second Optional Protocol to the International Covenant on Civil and Political Rights, which aims at the abolition of the death penalty, entered into force on 11 July 1991, having received the minimum 10 ratifications or accessions required. As of 30 September 1995, the Protocol had been ratified or acceded to by 28 States.

### Worldwide Influence of the International Bill of Human Rights

From 1948, when the Universal Declaration of Human Rights was adopted and proclaimed, until 1976 when the International Covenants on Human Rights entered into force, the Declaration was the only completed portion of the International Bill of Human Rights. The Declaration, and at a later stage the Covenants, exercised a profound influence on the thoughts and actions of individuals and their Governments in all parts of the world.

The International Conference on Human Rights, which met at Teheran from 22 April to 13 May 1968 to review the progress made in the 20 years since the adoption of the Universal Declaration and to formulate a programme for the future, solemnly declared in the Proclamation of Teheran:

1. *It is imperative that the members of the international community fulfill their solemn obligations to promote and encourage respect for human rights and fundamental freedoms for all without distinctions of any kind such as race, colour, sex, language, religion, political or other opinions;*
2. *The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all*



*members of the human family and constitutes an obligation for the members of the international community;*

3. *The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the International Convention on the Elimination of All Forms of Racial Discrimination as well as other conventions and declarations in the field of human rights adopted under the auspices of the United Nations, the specialized agencies and the regional intergovernmental organizations, have created new standards and obligations to which States should conform.*

Thus, for more than 25 years, the Universal Declaration on Human Rights stood alone as an international "standard of achievement for all peoples and all nations." It became known and was accepted as authoritative both in States which became parties to one or both of the Covenants and in those which did not ratify or accede to either. Its provisions were cited as the basis and justification for many important decisions taken by United Nations bodies; they inspired the preparation of a number of international human rights instruments, both within and outside the United Nations system; they exercised a significant influence on a number of multilateral and bilateral treaties; and they had a strong impact as the basis for the preparation of many new national constitutions and national laws.

The Universal Declaration came to be recognized as a historic document articulating a common definition of human dignity and values. The Declaration is a yardstick by which to measure the degree of respect for, and compliance with, international human rights standards everywhere on earth.

The coming into force of the Covenants, by which States parties accepted a legal as well as a moral obligation to promote and protect human rights and fundamental freedoms, did not in any way diminish the widespread influence of the Universal Declaration. On the contrary, the very existence of the Covenants, and

the fact that they contain the measures of implementation required to ensure the realization of the rights and freedoms set out in the Declaration, gives greater strength to the Declaration.

Moreover, the Universal Declaration is truly universal in scope, as it preserves its validity for every member of the human family everywhere regardless of whether or not Governments have formally accepted its principles or ratified the Covenants. On the other hand, the Covenants, by their nature as multilateral conventions, are legally binding only on those States which have accepted them by ratification or accession.

In many important resolutions and decisions adopted by United Nations bodies, including the General Assembly and the Security Council, the Universal Declaration of Human Rights and one or both Covenants have been cited as the basis for action.

Nearly all the international human rights instruments adopted by United Nations bodies since 1948 elaborate on principles set out in the Universal Declaration of Human Rights. The International Covenant on Economic, Social and Cultural Rights states in its preamble that it developed out of recognition of the fact that

*in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.*

A similar statement is made in the preamble to the International Covenant on Civil and Political Rights.

The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly in 1975 (resolution 3452 (XXX)), spells out the meaning of article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

This prohibition was further reinforced by the adoption in 1984 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly resolution 39/46). Similarly, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the General Assembly in 1981 (resolution 36/55) clearly defines the nature and scope of the principles of non-discrimination and equality before the law and the right to freedom of thought, conscience, religion and belief contained in the Universal Declaration and the International Covenants.

A similar situation prevails as regards international human rights instruments adopted outside the United Nations system. For example, the preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe at Rome in 1950, concludes with the following words:

*Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.*

Article II of the Charter of the Organization of African Unity, adopted at Addis Ababa in 1963, provides that one of the purposes of the Organization is "to promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights." The American Convention on Human Rights, signed at San José, Costa Rica in 1969, states in its preamble that the principles to which it gives effect are those set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights.

Judges of the International Court of Justice have occasionally invoked principles contained in the International Bill of Human Rights as a basis for their

decisions. National and local tribunals have also frequently cited principles set out in the International Bill of Human Rights in their decisions. Moreover, in recent years, national constitutional and legislative texts have increasingly provided measures of legal protection for those principles; indeed, many recent national and local laws are clearly modeled on provisions set forth in the Universal Declaration of Human Rights and the International Covenants, which remain a beacon for all present and future efforts in the field of human rights, both nationally and internationally.

Finally, the World Conference on Human Rights, held at Vienna in June 1993, adopted by acclamation the Vienna Declaration and Programme of Action, in which it welcomed the progress made in the codification of human rights instruments and urged the universal ratification of human rights treaties. In addition, all States were encouraged to avoid, as far as possible, the resort to reservations (part I, para. 26).

Thus, the International Bill of Human Rights represents a milestone in the history of human rights, a veritable Magna Carta marking mankind's arrival at a vitally important phase: the conscious acquisition of human dignity and worth.





## NATIONAL HUMAN RIGHTS INSTITUTIONS: BACKGROUND AND OVERVIEW\*

### Human Rights System

National institutions are but one component of a complex, multi-level system which has been developed for the promotion and protection of human rights. The following paragraphs provide a brief overview of this system in order to illustrate the place of national institutions, and the functions and responsibilities with which they may appropriately be entrusted.

#### *The United Nations and Human Rights*

In the Preamble to the Charter of the United Nations, the peoples of the United Nations declare their determination "to save succeeding generations from the scourge of war...to reaffirm faith in fundamental human rights... and to promote social progress and better standards of life in larger freedom." Accordingly, Article I of the Charter proclaims that one of the purposes of the United Nations is to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.

In the 45 years since the adoption of the Universal Declaration of Human Rights, the United Nations has developed a comprehensive strategy aimed at achieving the human rights objective set out in the Charter. The basis of this strategy is the body of international rules and standards which now cover virtually every sphere of human activity.

Upon this strong legislative foundation has been built an extensive network of human rights machinery designed to further develop international standards, to monitor their implementation, to promote compliance,

and to investigate violations of human rights. The strategy is reinforced by a wide variety of public information activities and a technical cooperation programme designed to provide practical help to States in their efforts to promote and protect human rights.

These structures and activities permit the United Nations to play a pivotal standard setting and leadership role in the struggle for human rights and fundamental freedoms. The task of promoting and protecting human rights, however, is not one which could or should be assumed by only one organization. United Nations practice in the field of human rights is based on the fundamental premise that universal respect for human rights requires the concerted efforts of every Government, every individual, every group and every organ in society.

#### *Regional Human Rights Systems*

The international system relies heavily on the support it receives from regional human rights systems such as those operating in Africa, the Americas and Europe. Regional human rights systems have played an important complementary role in reinforcing international standards and machinery by providing the means by which human rights concerns can be addressed within the particular social, historical and political context of the region concerned.

#### *Non-governmental Organizations*

Additional support for implementation of international human rights standards comes from concerned community and non-governmental organizations, which have a special role to play in the development of a universal culture of human rights. Non-governmental organizations, by their very nature, have a freedom of expression, a flexibility of action and a liberty of movement which, in certain circumstances, allow them to perform tasks which Governments and intergovernmental organizations are unable or even unwilling to perform.

\* Excerpts from the National Human Rights Institutions, Professional Training Series No.4, NY & Geneva: United Nations, 1995, pp. 3-9.

### *Governments*

In the past two decades, many countries have become parties to the major human rights treaties, thereby incurring a legal obligation to implement the human rights standards to which they subscribe at the international level. Human rights involve relationships among individuals, and between individuals and the State. The practical task of protecting human rights is therefore primarily a national one, for which each State must be responsible. At the national level, rights can be best protected through adequate legislation, an independent judiciary, the enactment and enforcement of individual safeguards and remedies, and the establishment and strengthening of democratic institutions. Activities aimed at the promotion of human rights and the development of a human rights culture should also be viewed as primarily national responsibilities. The most effective education and information campaigns, for example, are likely to be those which are designed and carried out at the national or local level and which take the local cultural and traditional context into account.

When States ratify a human rights instrument, they either incorporate its provisions directly into their domestic legislation or undertake to comply in other ways with the obligations contained in the instrument. Therefore, universal human rights standards and norms today find their expression in the domestic laws of most countries. Often, however, the fact that a law exists to protect certain rights is not enough if that law does not also provide for all the legal powers and institutions necessary to ensure the effective realization of those rights.

This problem of effective implementation at the national level has, particularly in recent times, generated a great deal of international interest and action. The emergence or reemergence of democratic rule in many countries has focused attention on the importance of

democratic institutions in safeguarding the legal and political foundations on which human rights are based. It has therefore become increasingly apparent that the effective enjoyment of human rights calls for the establishment of national infrastructures for their promotion and protection. In recent years, many countries have established institutions with the expressed function of protecting human rights. While the specific tasks of such institutions may vary considerably from country to country, they share a common purpose, and for this reason are referred to collectively as human rights institutions.

### **Defining a National Human Rights Institution**

Despite the existence of comprehensive standards relating to practice and to functions, an analysis of activities conducted both within and outside the United Nations system reveals that there is not yet an agreed definition of the term "national human rights institution." The conceptual framework for early United Nations activities in the area was flexible enough to include virtually any institution at the national level having a direct or indirect impact on the promotion and protection of human rights. Accordingly, the judiciary, administrative tribunals, legislative organs, non-governmental organizations, legal aid offices and social welfare schemes were all given equal attention, along with national commissions, ombudsman offices and related structures.

This broad formulation has however been gradually pared down by the subsequent work of the United Nations on the subject, to the point where a more narrow group of institutions has emerged on the basis of particular common functions, including: educational and promotional activities; the provision of advice to government on human rights matters; and the investigation and resolution of complaints of violations committed to public (and occasionally also private) entities. However, while operating to exclude previously included institutions such as the judiciary, the legislature



and social welfare structures, this "functional" approach to categorization has not yet resulted in an ultimate definition of what constitutes a national institution for the promotion and protection of human rights.

The Paris Principles relating to the status of national institutions represent an important step in the evolutionary process. The principles attempt to clarify the concept of a "national institution" by providing standards on the status and advisory role of national human rights commissions. If these standards are applied to the general class of national institutions, not only to those designated as "commissions", then a national institution must be a body established in the constitution or by law to perform particular functions in the field of human rights. This process will then operate to exclude not only governmental instrumentalities with more general functions (such as administrative tribunals), but also all organizations not founded on law.

Despite these refinements, it is evident that the concept of a national institution is not yet fully evolved. At the same time, the practical utility of establishing boundaries, however flexible, has been recognized. For the purpose of United Nations activities in this field, therefore, the term "national institution" is taken to refer to a body which is established by a Government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights.

#### National Institutions in Practice

In practice, the institutions included in the above definition are all "administrative" in nature - in the narrow sense that they are neither "judicial" nor lawmaking. As a rule, they are endowed with ongoing, advisory authority in respect of human rights at the national and/or international level. These purposes are pursued either in a general way, through opinions and recommendations, or through the consideration and resolution of complaints submitted by individuals or groups. In some countries, the constitution provides for

the establishment of a national human rights institution. More often, such institution is created by legislation or decree. While many national institutions are attached, in some way or another, to the executive branch of government, the actual level of independence which they enjoy will depend on a number of factors, including composition, financial basis and the manner in which they operate.

#### *Classification Difficulties*

The existence of such common characteristics has not prevented significant classification difficulties. At present, the majority of national institutions are identified as belonging to one of two broad categories: "human rights commission" or "ombudsmen".

Human rights commissions are generally involved in one more specific functions directly related to the promotion and protection of human rights, including an advisory function (with regard to law and government policy on human rights), an educative function (oriented towards the public), and what may be termed an impartial investigatory function. Differences between various commissions are often related to differences in the weight given to particular functions. The focus of a commission may range across a broad spectrum of rights or, conversely, may be restricted to protection of a particular vulnerable group.

From a comparative perspective, the institution of ombudsman is generally associated with an emphasis on the impartial investigatory function. Many long-established offices of the ombudsman do not concern themselves directly with human rights except in so far as they relate to their principal function of overseeing fairness and legality in public administration. Others, particularly the more recently created offices, have been given specific human rights protection mandates, often in relation to rights set forth in national constitutions or other legislation.

Despite the existence of such indicators, precise classification of a particular institution is complicated



by the fact that functions implied in these designations are not always reflected in the work of institutions so categorized. An "ombudsman", for example, may be engaged in a broad range of promotional and protective activities generally recognized as characteristics of a commission. An entity identified as a "human rights commission" may be operating exclusively within the sphere of public administration—a domain traditionally associated with the office of the ombudsman.

In view of such inconsistencies, it is clear that any attempt at nominal classification will be somewhat arbitrary and that a functional approach to defining national institutions may be more appropriate. However, as distinctions and categorizations continue to exist in practice, they cannot be ignored. In providing an overview of existing national institutions, the following sections outline the features, generally associated with national commissions, specialized commissions and offices of the ombudsman.

#### *Human Rights Commissions*

In many countries, commissions have been established to ensure that the laws and regulations concerning the protection of human rights are effectively applied. Most human rights commissions function independently of other organs of government although they may be required to report to the legislature on a regular basis.

In keeping with their independent nature, commissions are generally composed of a variety of members from diverse backgrounds, each with a particular interest, expertise or experience in the field of human rights. Each country may have its specific requirements or restrictions for the selection of members, such as quotas on the number of representatives or candidates from various professional categories, political parties or localities.

Human rights commissions are concerned primarily with the protection of persons against all forms of discrimination and with the protection of civil and

political rights. They may also be empowered to promote and protect economic, social and cultural rights. The precise authority and functions of a particular commission will be defined in the legislative act or decree under which it is established. This law or decree will also serve to define the commission's jurisdiction by, *inter alia*, specifying the range of discriminatory or violative conduct which it is empowered to investigate or otherwise act on. Some commissions concern themselves with alleged violations of any rights recognized in the constitution. Others may be able to consider cases of discrimination on a broad range of grounds, including race, religion, gender, national or ethnic origin, disability, social condition, sexual orientation, political opinion, ancestry, age and marital status.

One of the most common functions vested in a human rights commission is to receive and investigate complaints from individuals (and, occasionally, from groups) alleging human rights abuses committed in violation of existing national law. In order to carry out its tasks properly, the commission will usually be capable of obtaining evidence relating to the matter under investigation. Even if used only rarely, this power is important in that it guards against the possibility of frustration through lack of cooperation on the part of the person or body complained against. While there are considerable differences in the procedures followed by the various human rights commissions in the investigation and resolution of complaints, many rely on conciliation and/or arbitration. In the process of conciliation, the commission will attempt to bring the two parties together in order to achieve a mutually satisfactory outcome. If conciliation fails to resolve the dispute, the commission may be able to resort to arbitration in which it will, after a hearing, issue a determination.

It is not common for a human rights commission to be granted authority to impose a legally binding outcome on parties to a complaint. However, this does not mean that the settlement or appropriate remedial steps



recommend by the commission can be ignored. In some cases, a special tribunal will hear and determine issues outstanding from an unresolved complaint. If no special tribunal has been established, the commission may be able to transfer unresolved complaints to the regular courts for a final and binding determination.

Another important function of many commissions is to systematically review the Government's human rights policy in order to detect shortcomings in human rights observance and suggest ways of improving it. Human rights commissions may also monitor the State's compliance with its own legislation and with international human rights laws and, if necessary, recommend changes. The ability of a commission to initiate inquiries on its own behalf is an important measure of its overall strength and probable effectiveness. This is particularly true in regard to situations involving persons or groups who do not have the financial or social resources to lodge individual complaints.

The full realization of human rights cannot be achieved solely through adequate legislation and appropriate administrative arrangements. In recognition of this fact, commissions are often entrusted with the important responsibility of improving community awareness of human rights. Promoting and educating about human rights may involve informing the public about the commission's own functions and purposes; provoking discussion about various important questions in the field of human rights; organizing seminars and training courses; arranging counseling services and meetings; and producing and disseminating human rights publications.

#### *Special Institutions*

Vulnerable groups differ from country to country, but the most common problem affecting them all is discrimination. Members of the community who are most often recognized by Governments as needing specialized human rights bodies to protect their interests are persons belonging to ethnic, linguistic and religious

minorities, indigenous populations, non-nationals, migrants, immigrants, refugees, children, women, the poor and the disabled.

Specialized human rights institutions are generally established to promote government and social policy which has been developed for the protection of one or more of these groups. For the most part, these institutions perform functions similar to those of the less specific human rights commissions described above. They are usually authorized to investigate instances and patterns of discrimination against individuals in the group and against the group as a whole. While generally able to investigate complaints brought by a member of the group against another person or against a government body, these specialized institutions are, like other national human rights institutions, rarely empowered to make binding decisions or to initiate legal action.

As well as providing material and consultative assistance on an individual and collective basis, such institutions will frequently be responsible for monitoring the effectiveness of existing laws and constitutional provisions as these relate to the group. In this way, they often act as consultants and advisers to parliament and the executive branch of government.

#### *The Ombudsman*

The office of "ombudsman" is now established in a wide range of countries, some of which use other designations to describe institutions in this category, such as *Avocat du peuple*, *défenseur del Pueblo*, *Médiateur de la République*, etc. The ombudsman (who is often one person but may also be a group of persons) is generally appointed by the parliament acting on constitutional authority or through special legislation. However, in parts of Africa and the Commonwealth, the ombudsman's appointment is the responsibility of the head of State, to whom the institution may also be required to report.

The primary function of this institution is to oversee fairness and legality in public administration. More



specifically, the office of the ombudsman exists to protect the rights of individuals who believe themselves to be the victim of unjust acts on the part of the public administration. Accordingly, the ombudsman will often act as an impartial mediator between an aggrieved individual and the Government.

While the institution of ombudsman is not exactly the same in any two countries, all follow similar procedures in the performance of their duties. The ombudsman receives complaints from members of the public and will investigate these complaints provided they fall within the ombudsman's competence. In the process of investigation, the ombudsman is generally granted access to the documents of all relevant public authorities and may also be able to compel witnesses, including government officials, to provide information. He or she will then issue a statement of recommendation based on this investigation. This statement is generally transmitted to the person lodging the complaint as well as to the office or authority complained against. In general, if the recommendation is not acted on, the ombudsman may submit a specific report to the legislature. This will be in addition to an annual report to the same body, which may include information on problems which have been identified and contain suggestions for legislative and administrative change.

Access to the ombudsman also varies from country to country. In many countries, individuals may lodge a complaint directly with the ombudsman's office. In other countries, complaints may be submitted through an intermediary, such as a local member of parliament. Complaints made to the ombudsman are usually confidential, and the identity of the complainant is not disclosed without that person's consent.

The ombudsman is not always restricted to acting on complaints and may be able to begin an investigation on his or her own initiative. As with human rights commissions, self-initiated investigations by ombudsman offices often relate to issues which the ombudsman may have determined to be of broad public concern, or issues

which affect group rights and are therefore not likely to be the subject of an individual complaint.

In many respects, the powers of the ombudsman are quite similar to those of human rights commissions with competence to receive and investigate complaints. Both are concerned with protecting the rights of individuals and, in principle, neither has the power to make binding decisions. There are nevertheless some differences in the functions of the two bodies which reveal why some countries establish and simultaneously maintain both types of institution. As explained above, the primary function of most ombudsmen is to ensure fairness and legality in public administration. In contrast, commissions are more generally concerned with violations of human rights, particularly discrimination. In this respect, human rights commissions will often concern themselves with the actions of private bodies and individuals as well as the Government. In general, the principal focus of activity for an ombudsman is individual complaints against public entities or officials. However, distinctions are becoming more and more blurred as ombudsman offices engage in a wider range of activities for the promotion and protection of human rights. Increasingly, offices of the ombudsman are assuming responsibilities in the area of promoting human rights, particularly through educational activities and the development of information programmes.





## HUMAN RIGHTS INSTITUTIONS IN THE ASIA-PACIFIC REGION\*

*Dr. Purification C. Valera Quinsinang*

Ratification and accession are two very important words. These impose certain obligations. When a member-state of the United Nations ratifies or accedes to an international human rights instrument, it creates upon itself the obligations to protect, promote and fulfill all those human rights identified and enumerated in said international instrument. Thus, it is incumbent upon that member-state to comply with these obligations through domestic legislation, affirmative administrative measures, an independent judiciary and the establishment of a national infrastructure to protect and promote human rights.

The effective implementation of these obligations at the national level in emerging or reemerging democratic societies has focused attention on the importance of institutions in safeguarding the legal and political foundations on which human rights are based.

In 1946, two years before the General Assembly proclaimed the Universal Declaration of Human Rights as "a common standard of achievement for all peoples and all nations,"<sup>1</sup> the question of national human rights institutions was first discussed by the Economic and Social Council (ECOSOC). The same body invited Member States "to consider the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission on Human Rights."<sup>2</sup>

After 14 years, in a resolution dated 25 July 1960, ECOSOC recognized the important role that national institutions could play in the promotion and protection

of human rights, and invited Governments to encourage the formation and continuation of such bodies as well as to communicate all relevant information on the subject to the Secretary General.

The discussions on national institutions progressed during the 1960s and 1970s, when the core of the debates was the standard setting in the field of human rights and how such bodies could assist in the implementation thereof. These led to the organization of a seminar, the Seminar on National and Local Institutions for the Promotion and Protection of Human Rights, held in Geneva in September 1978, for the drafting of the guidelines on the structure and functioning of national institutions. On account of the guidelines, the General Assembly invited States to take appropriate steps for the establishment of national institutions for the promotion and protection of human rights.

In the 1980s, while the United Nations continued to take active interest in this endeavor, several institutions were established. To date, there are now more than a hundred national institutions established worldwide. These institutions vary in structure and powers depending on the laws or statutes of the State creating them. By and large, they are administrative bodies and, by narrow definition are neither vested with legislative nor judicial powers. At present, these national institutions may be classified in either category, namely: (1) human rights commissions or (2) ombudsmen.

Generally, the human rights commissions and the offices of the ombudsman share similar authority in receiving and investigating complaints, in order to protect the rights of individuals. However, the human rights commissions are endowed with specific functions directly associated with the promotion and protection of human rights, performing advisory function, information dissemination and education functions, and investigative function. These commissions may act based on the broad scope of the human rights of peoples or may be limited to protect the rights of a specific vulnerable group. Thus, many human rights

\* Speech delivered on the occasion of the 18<sup>th</sup> Biennial Congress of LAWASIA 2003, 1-5 September 2003, Tokyo, Japan.



commissions have been established to make sure that laws of the state or the policies it adopts relating to human rights protection are effectively implemented.

On the other hand, the office of the "ombudsman" functions to oversee the fairness and legality in public administration. In a more judicious sense, the office of the ombudsman is created to see to the protection of the rights of individuals who believe that they are victims of unjust acts of public administration.

The third form of national institution existing nowadays are specialized institutions established to protect the interest of persons belonging to ethnic, linguistic and religious minorities, indigenous populations, non-nationals, migrants, immigrants, refugees, children, women, the poor and the disabled. The most common problem affecting them is discrimination. For this reason, some States have created such specialized institutions with authority to investigate violations and patterns of discrimination against individuals in the group or against the group as a whole.

During the 1993 World Conference on Human Rights in Vienna, Austria, State parties to the International Bill on Human Rights reaffirmed the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, and their role in providing remedies to violations of human rights, in the dissemination of human rights information and in education in human rights. Likewise, the World Conference encouraged the establishment and strengthening of national institutions, having regard to the "Principles Relating to the Status of National Institutions,"<sup>3</sup> popularly known as the Paris Principles.

The Paris Principles prescribed certain elements for the effective functioning of national institutions. These are:

- Independence through legal and operational autonomy, through financial autonomy, through

- appointment and dismissal procedures, and through composition;
- Defined jurisdiction and adequate powers over the subject-matter delineating specific functions in order to avoid conflicts of jurisdiction;
- Accessibility to ensure awareness by its constituents of its existence, to make its programs readily available to the public and to make it as representative to the people it serves;
- Cooperation with non-government organizations; between national institutions and with intergovernmental organizations, in order to strengthen a commission's programs and services, thus intensifying the accomplishment of its objectives;
- Operational efficiency supported with adequate resources, efficient working methods and qualified and committed personnel; and
- Accountability through reporting obligations and procedure of examining reports.

Within the Asia-Pacific Region, there are at least 15 national human rights institutions in existence, either taking the form of a human rights commission or ombudsman, as discussed above, or a specialized agency. Some of these institutions have collaborated with a number of regional governments and non-governmental organizations to organize the Asia-Pacific Forum of National Human Rights Institutions. The Forum was conceived to foster dialogue, cooperation and mutual support between and among national institutions in the Asia-Pacific Region as a step to better regional mechanisms for the promotion and protection of human rights.

The Forum was developed in a meeting in Darwin, Australia in 1996 among four national human rights institutions from India, Indonesia, Australia and New Zealand. These Commissions agreed to encourage and provide practical assistance to regional governments to establish national human rights institutions. At the end



of their meeting, the Commissions adopted the Larrakia Declaration,<sup>4</sup> wherein the following principles governing the functioning of national institutions were set forth:

- Respond, where possible, with personnel and other support to requests from governments in the region for assistance in the establishment and development of national institutions;
- Expand mutual support, co-operation and joint activity among member commissions through:
  1. Information exchanges.
  2. Training and development for commission members and staff.
  3. Development of joint positions on issues of common concern.
  4. Sharing expertise.
  5. Periodical regional meetings.
  6. Specialist regional seminars on common themes and needs.
  7. Responding promptly and effectively to requests from other national institutions to investigate violations of the human rights of the nationals present in a country that has a national institution.
- Welcome as participants in the Forum other independent national institutions to conform with the Paris Principles
- Encourage governments and human rights non-government organizations to participate in Forum meetings as observers.

In its recent meeting held in New Delhi, India from 11 to 13 November 2002, the Asia-Pacific Forum admitted as new members the national human rights institutions of Malaysia, Republic of Korea and Thailand, bringing the total membership to 12. Assisted by the Advisory Council of Jurists, the members of the Forum discussed the proposal to develop a new international convention

on the rights of peoples with disability and recommendations on the implementation of the Convention on Trafficking Against Persons, particularly Women and Children.<sup>5</sup>

The Commission on Human Rights of the Philippines is an accredited independent body created by the Constitution and fulfilling the requirements of the Paris Principles. It became a member of the Asia Pacific Forum when, together with the Sri Lankan Commission on Human Rights, it joined the Forum in the latter part of 1996.

After 16 years, the Commission is instituting reforms to prioritize economic, cultural and social rights, and issues on good governance. Our present challenges are the peace and order situation, poverty, and protection of vulnerable sectors.

Insurgency and kidnapping-for-ransom give rise to human rights violations attributable to both government agents and insurgents and lawless elements. The Commission investigates ALL cases of violations, regardless of whether these are attributed to government or non-government parties. We have persuaded the government to adopt the human security approach in conflict-affected areas.

A root cause of the present peace and order problem is widespread abject poverty. This is why the Commission puts economic, cultural and social rights at the top of its agenda. The horrendous foreign debt burden of the government is, in the view of the Commission, a major obstacle to poverty alleviation, and is an issue calling for urgent global action.

In the area of social issues, the Commission uses a multi-pronged approach to promote and protect the rights of women, children and other vulnerable sectors through investigation, public information, legislation and judicial reform. The Commission is assisting in the drive for the full implementation of the Indigenous People's Rights Act.

A new role the Commission is taking is to bring to reality the concept of the rights-based approach to

development. Through our initiative, the government-UNDP Cooperation Programme has adopted the rights-based approach. The Commission leads the capacity building of government and non-government organizations to mainstream human rights and gender concerns in governance and development processes.

Our promotion and education component focuses on educators, community-based units, and – because of their record of human rights violations – the military and police.

The Commission works with the Judiciary to incorporate human rights norms in its judicial reform program. We educate judges on human rights through the Supreme Court's Philippine Judicial Academy, with support from U.N. agencies such as UNICEF.

The Commission issues advisories and supports the passage of legislation including bills on the Comprehensive Juvenile Justice System and bills against torture, involuntary disappearance, trafficking in persons, and abuse of women in intimate relationships.

The Commission advocates the abolition of the death penalty, and the ratification of the International Criminal Court statute.

The Commission has strengthened linkages in the international community, including those with the Asia Pacific Forum and the informal working group to establish an ASEAN Mechanism for Human Rights.

We supported the national commissions of Thailand and Sri Lanka when their independence was challenged. We extended technical assistance to the Commissions of Nepal and Mongolia. When the mass deportation of Filipino workers in Sabah resulted in allegations of serious violations of human rights, we worked with the Malaysian Commission to investigate.

Strengthened relationships will surely benefit all of us as we work towards our shared goal of justice and peace through the promotion and protection of human rights.

In the same vein, let me quote United Nations Secretary General Mr. Kofi Annan when he reported to the UN General Assembly on 9 September 2002. He said:

*"...Building strong human rights institutions at the country level is what in the long run will ensure that human rights are protected and advanced in a sustained manner. The emplacement or enhancement of a national protection system in each country, reflecting international human rights norms, should therefore be a principal objective of the Organization."*

And I say: It should be ours too!

### Endnotes

<sup>1</sup>Universal Declaration of Human Rights.

<sup>2</sup>Economic and Social Council Resolution 2/9 of 21 June 1946, section 5.

<sup>3</sup>Commission on Human Rights resolution 1992/54 of 3 March 1992, Annex.

<sup>4</sup>Larrakia Declaration: Conclusions, Recommendations and Decisions, First Asia Pacific Regional Workshop of National Human Rights Institutions, Darwin Australia, 8-10 July 1996.

<sup>5</sup>Concluding Statement, Seventh Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, New Delhi, India, 11-13 November 2002.

### References

- Commission on Human Rights resolution 1992/54 of 3 March 1992, Annex.
- Concluding Statement, Seventh Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, New Delhi, India, 11-13 November 2002.
- Economic and Social Council Resolution 2/9 of 21 June 1946, section 5.



Larrakia Declaration: Conclusions, Recommendations and Decisions, First Asia Pacific Regional Workshop of National Human Rights Institutions, Darwin Australia, 8-10 July 1996.

Universal Declaration of Human Rights.



#### **PURIFICACION V. QUISUMBING**

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#### **RIGHT TO DEVELOPMENT FRAMEWORK: MAINSTREAMING HUMAN RIGHTS, GENDER AND RIGHT TO INFORMATION IN PUBLIC GOVERNANCE AND CIVIL SOCIETY\***

**T**he United Nations Declaration on the Right to Development is principally the framework of the Right to Development (RTD) Shell Program under the Governance Portfolio of the GOP-UNDP Country Cooperation Framework (CCF). The implementation of this framework should cut across the various governance issues represented by the other eight shell programmes under the Governance Portfolio to include: Electoral/Political Reforms, Judicial Reform, Anti-Corruption, Civil Service and Economic Management, Decentralization/Local Governance, Legislative Reform, Globalization and Corporate Citizenship and Governance Review. The same framework should apply to all the other three development portfolios such as the empowerment of the poor, environment sustainability, and peace and development. The declaration touches on development as a human right and specifies obligations for states and governments which, at the same time, should provide a clear direction, purpose and meaning to all the shell programmes and portfolios under the GOP-UNDP Country Cooperation Framework. The components of the declaration that should have overriding influence on both governance and development concerns cover the following:

- The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate

\* Final Output of the Project on Right to Development Framework: Mainstreaming Human Rights, Gender and Right to Information in Public Governance and Civil Society which operationalizes the General Framework of the UN Declaration on the Right to Development, February 2003.

in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

- The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.
- The human person is the central subject of development and should be the active participant and beneficiary of the right to development.
- All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfillment of the human being; they should therefore promote and protect an appropriate political, social and economic order for development.
- States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and the fair distribution of the benefits resulting therefrom.
- States have the primary responsibility for the creation of national and international conditions favorable to the realization of the right to development.
- The realization of the right to development requires full respect for the principles of international law concerning friendly relations

and co-operation among States in accordance with the Charter of the United Nations.

- States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfill their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.
- States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.
- All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights.
- Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing



countries, effective international co-operation is essential. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

- States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.
- Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.

Human rights and sustainable human development are inextricably linked, complementary and multidimensional. They are also interdependent and mutually reinforcing.<sup>1</sup> The relationship of human rights and sustainable human development is said to be twofold. First, the process of development can be viewed as an expansion of human freedoms. Human development is concerned with the fulfillment of basic human rights and fundamental freedoms. Second, human rights play an instrumental role in the process of development. They express not only goals to be achieved, but also to provide development workers with effective tools to be used in the eradication of poverty.<sup>2</sup>

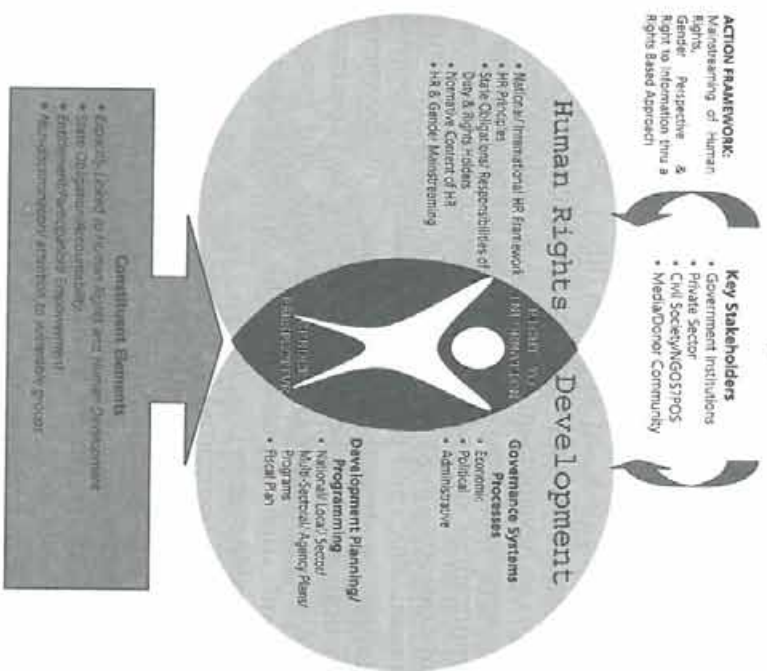
### The Action Framework

Specifically for the purpose of implementing the Right to Development in the context of the COP-UNDP-CCF, an Action Framework for Mainstreaming Human Rights, Gender Perspective and Right to Information to Governance and Development Processes is adopted using a Rights-Based Approach (RBA). RBA is referred to as the mainstreaming process to explicitly link human rights to development. As RBA is an evolving concept, the approach as envisioned for this purpose has varied applications depending on the nature of activity and operations of government and non-government organizations and people's organizations. The approach focuses on strengthening the capacities of government institutions, the so-called civil society, and specifically the non-government organizations and people's organizations representing the disadvantaged and vulnerable sectors (Fig. 1).

As contextualized in the conditions of Philippine society, two separate spheres that overlap, depicting their level of interconnection, best represent human rights and development. The objective is to increase and widen the level of convergence of human rights with development through the mainstreaming of human rights into the governance processes that provide the entire enabling environment to realize development. Over the decades, human rights and development have been independently and separately operating under their respective frameworks, processes and approaches. While the United Nations has made pronouncements on a rights-based development for over a decade now, these two spheres have remained separate. Ideally, under the Declaration on the Right to Development, the economic, social, cultural and development processes should enable the full realization of human rights and freedoms, such that it would likely appear that development is a subset of human rights or a small circle within the human rights circle serving as the framework. However, realities point to the fact that this is not the case. It is more like human rights appearing as the small circle within a



Figure 1



bigger development circle. The very little resources allocated to human rights are indications of lesser commitment to human rights by the government. Thus, the initial approach is for workers and advocates of both human rights and development to look into areas of convergence and cooperation. A better understanding and appreciation of how each sphere works shall make possible the widening of interconnection between human rights and development.

#### A. Human Rights Sphere

Human rights principles are essential conditions to facilitate the definite enjoyment of rights, and these principles originated from human rights norms. These

SOURCE BOOK ON HUMAN RIGHTS

human rights principles are *Universality, Non-discrimination and Equality, Attention to Vulnerable Groups, Equity, Indivisibility, Interdependence and Interrelatedness, People's Participation, Empowerment, Good Governance, Independence of the Judiciary, Legislative Capacity, and Transparency.*

The core human rights instruments are contained in six treaties that are legally binding for all countries that have signed and ratified them. Policy makers, decision makers and development planners and programmers in the field of governance within the sphere of development should be able to recognize the application and observance of human rights in their respective areas of work and operations. These core instruments are:

**The Covenant on Economic, Social and Cultural Rights (1966)** – This particular covenant provides the right to work; the right to form trade unions and to strike; the right to social security and social insurance; the right to an adequate standard of living, including the right to food, clothing and housing; the right to health; the right to education; the right to take part in cultural life; the right to enjoy the benefits of scientific progress; and the right to protection of the family. The right to self-determination and the right to equality and freedom from discrimination are contained in this covenant and in the **Covenant on Civil and Political Rights.**

**The Covenant on Civil and Political Rights (1966)** – This covenant guarantees the right to life; the right to freedom from torture and slavery; the right to liberty and security of person; the right to freedom of movement and residence; the right to equal protection of laws; the right to privacy; the right to freedom of thought, conscience and religion; the right to freedom of expression; the right to freedom of assembly and association; and the right to take part in the conduct of public affairs.

**The Convention on Elimination of Racial Discrimination (1965)** – provides assurance against discrimination or exclusion from development. The convention provides that there can be no discrimination

International and National Institutions on Human Rights



in the enjoyment of the economic, social, cultural and political rights.

*The Convention on Elimination of All Forms of Discrimination Against Women (1979)* - This convention ensures against discrimination or exclusion of women from development and provides the right of women to participate in political, economic and social life.

*The Convention on the Rights of the Child (1989)* - reaffirms children's right to life, right to identity and nationality; right to freedom of expression; right to freedom of thought, conscience and religion; right to freedom of association and assembly; right to privacy; right to access to information; right to protection against violence, abuse and neglect; right to health; right to education; right to an adequate standard of living; right to social security; right to rest and leisure; right to freedom from exploitation; right to freedom from trafficking in children and protection against prostitution; right to freedom from torture and cruel, inhuman and degrading treatment and rights with respect to criminal process. Guaranteed under this convention are children's survival rights, right to participation and the right to development.

*The Convention Against Torture (1984)* - This convention guarantees protection against torture and other cruel, inhuman or degrading treatment or punishment that are of special relevance to development activities and their impact.

### Normative Content of Human Rights<sup>3</sup>

The normative content of a particular right refers to the specific standards protected by such right or its actual meaning. Human Rights Standards can be used as objective standards of human dignity in the development process. These standards become important guides to be used in a dynamic process such as development because the normative content of human rights includes guidance for "immediate and progressive" realization. Enumerated below are some rights with their corresponding normative base.

*Right to Life* is the supreme and inherent human right from which no derogation is permitted, even in time of war or public emergency. Whereas, it begins at birth according to International Law, it begins at conception under Philippine Law. Its normative bases include: Article 3 of UDHR; Article 6 of ICCPR; General Comment 6, HRC (1982); Article 5(b) of ICERD; Article 6 CRC; and Section 1, Article III of the 1987 Philippine Constitution.

*Equality and Non-Discrimination* includes substantive equal protection of the law and enjoyment of all civil, political, economic, social and cultural rights. Its most important element is the distinction, exclusion, restriction, preference or prohibition of discrimination based on race, color, sex/gender, language, disability, descent, age, religion, political or other opinion, national or ethnic/social origin, property, birth or other status which has the effect or purpose of impairing/nullifying the recognition, enjoyment or exercise of human rights. Equality's normative bases are: Article 7 of UDHR; Article 3 of ICESR; Article 8(1) of the Right to Development; Article 5 of ICERD; Article 9&15 of CEDAW; Section 1 Article III of the 1987 Philippine Constitution; and for Non-Discrimination: Article 7 of UDHR; Article 2(2) of ICESR; Article 2(1) & 20(2) of ICCPR; Article 6(1) of the Right to Development; Article 1, 3&4 of ICERD; Article 1, 2, 4&7 of CEDAW; and Article 2 of CRC.

*Political Rights and Freedoms: Right to Participate in Government, Freedoms of Opinion and Expression, Freedom of Movement, Right of Peaceful Assembly and Association* may be exercised directly or indirectly, individually or collectively but must be a free, genuine and voluntary exercise.

The normative bases are: for Freedom of Opinion and Expression, Article 19 of UDHR; Article 19 of ICCPR; Article 5(d) (viii) of ICERD; Article 12&13 of CRC; Section 4, Article III of the 1987 Philippine Constitution; Right to Participate in Government Article 21 of UDHR; Article 5 of ICERD; and Section 16, Article III of the 1987 Philippine Constitution; for Freedom of Movement, Article 13 of



UDHR; Article 12 of ICCPR; Section 6, Article III of the 1987 Philippine Constitution; and for Right of Peaceful Assembly and Association, Article 20 of UDHR; Article 20&21 of ICCPR; Article 5(d) (ix) of ICERD; Article 15 of CRC; and Section 4, Article III of the 1987 Philippine Constitution.

*Right to Social Security* is a right to security in the event of unemployment, sickness, disability, widowhood, old age or lack of livelihood in circumstances beyond one's control. The normative bases for Right to Social Security are: Article 22 of UDHR; Article 9 of ICESCR; General Comment 5 & 6 ICESR (1994/1995); Article 8(1) of the Right to Development; Article 11 (e) of CEDAW; and Article 25 of CRC.

*Right to Work* includes two significant social functions: the source of livelihood and income, and the source of dignity and self-realization. The normative bases are: Article 23 of UDHR; Article 6, 7 & 8 of ICESCR; Article 8(1) of the Right to Development; Article 5(e)(i), (ii) of ICERD; Article 11 of CEDAW; Article 32 of CRC; and Section 3, Article XIII of the 1987 Philippine Constitution.

*Right to Health* is a right to access to and enjoyment of health services and facilities, and to enjoy certain social conditions favorable to the highest attainable standard of health. The normative bases are: Article 25 of UDHR; Article 12 of ICESCR; General Comment 14 ICESCR (2000); Article 8 of the Right to Development; Article 5(e)(iv) of ICERD; Article 12 of CEDAW; Article 24 of CRC; and Sections 11, 12, & 13, Article XIII of the 1987 Philippine Constitution.

*Right to Food* implies availability, adequacy and accessibility of food supply, and the stability of the supply. It is not limited to calories, proteins and specific nutrients. It is linked to sustainability not only for the present but also for the future generations. The normative bases are: Article 25 of UDHR; Article 11 of ICESCR; General Comment 12 ICESCR (1999) and Article 8 of the Right to Development.

*Right to Housing* is the right to live somewhere in security, peace and dignity. Its core contents include the legal security of tenure, availability, affordability, habitability, accessibility, location, and cultural adequacy. The normative bases are: Article 25 of UDHR; Article 11 of ICESCR; General Comment 4 of ICESCR (1991); General Comment 7 of ICESCR (1997); Article 8 of the Right to Development; Article 5(e)(iii) of ICERD; Section 9 & 10 and Article XIII of the 1987 Philippine Constitution.

*Right to Education* is both a human right in itself and an indispensable means of realizing other human rights. Education should therefore be non-discriminatory; physically and economically accessible, relevant and culturally appropriate, and adaptable to the changing needs of societies and communities. The right to education necessitates having functioning educational institutions and existing programs in sufficient quantities with trained teachers and teaching materials. Its aim is for the best interest of children. It also includes the right to free universal primary education, secondary higher, fundamental, technical and vocational education. The government is also required to set up a school system and to respect educational freedom, such as freedom of parents/guardians to choose the school for their children and right of foreigners to set up schools. The normative bases for Right to Education include: Article 26 of UDHR; Article 13 of ICESCR; General Comment 11 of CESCR (1999); General Comment 13 of CESCR (1999); Article 8(1) of the Right to Development; Article 5(e)(v) of CERD, Article 10 of CEDAW; Articles 28 & 29 of CRC; and Article XIV of the 1987 Philippine Constitution.

*Right of Reparation* is an inherent right associated with an effective protection of human rights. It comes to the forefront when rights are violated, and has four components: restitution, compensation, rehabilitation, and non-repetition.

#### Nature and Levels of State Obligations<sup>4</sup>

State Obligations originated from the national and international human rights framework. It requires a



particular conduct now ("immediately") and the attainment of certain results over time ("progressively"). Whereas human rights always imply human duties and responsibilities, most of these duties or obligations are reposed on the State, because the State's political, economic, and military power over its citizen is both a major threat to human rights and also its major guarantee and protection. The State is under obligation to take steps, to the maximum of its available resources and by all appropriate means, with a view to achieving progressively the full realization of rights.

There are two ways of classifying State Obligations:

1. *Obligation of conduct* refers to the obligation of the State to act or not to act in a certain manner while *Obligation of Result* sees the State as facilitator and provider of rights.
2. *Obligations to Respect, Protect and Fulfill* are the Generic Obligations of the State, also known as the Levels of State Obligations.
  - a. *Obligation to Respect* - The State should not directly violate the rights of its citizens. It must not destroy people's livelihood, people's personal security or health, people's homes, people's cultural identity, etc.
  - b. *Obligation to Protect* - The State should protect its citizens from human rights violations committed by others. It has the obligation to prohibit and prevent human rights violations, and of ensuring adequate access to legal remedies in case of violations by third parties, and not conniving with or allowing any third party to destroy people's possessions.
  - c. *Obligation to Fulfill* - The State should facilitate and promote the full exercise of rights by its citizens, becoming a direct provider in exceptional circumstances. And this has two dimensions, namely:
    1. *Obligation to Facilitate or Promote* - The State should remove the hindrances which prevent

disadvantaged groups from enjoying opportunities that are available to others. It should take the necessary measures to "facilitate", as much as possible, the exercise of rights by individuals by guaranteeing real opportunities for people to exercise their rights fully. The State should be obliged to accept appropriate legislative measures towards the full enjoyment of rights by all.

2. *Obligation to Provide* - The State has the obligation to directly provide the right in question when individuals or groups are unable to realize their rights by the means at their disposal, for reasons beyond their control.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the significance of resources in fulfilling human rights standards, but does not consider resource availability to be an escape clause. For example, it has stated that, "in cases where significant numbers of people live in poverty and hunger, it is for the State to show that its failure to provide for the persons concerned was beyond its control."<sup>5</sup>

The ICESCR has made it clear that "even where the available resources are demonstrably inadequate, the obligation remains for a State Party to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances."<sup>6</sup> In addition, the committee has stated that, "even in times of severe resource constraints... vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes."<sup>7</sup>

It is normally assumed that because resources are required for the realization of ESC rights, they are incapable of immediate implementation. However, the ICESCR has stated:

*the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all*



meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant, which is to establish clear obligations for State Parties in respect of full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.<sup>5</sup>

#### B. Development Sphere

Development Sphere has recognized a comprehensive economic, social, cultural, political, environmental and spiritual process referred to as sustainable or holistic development. The concept of development has evolved over the decades, thus showing the interconnectedness of all these aspects of development. Many innovative approaches have likewise emerged to make development processes more responsive to various human phenomena. Hence, it has propounded that the human person is both the participant and beneficiary of development with the notion that the human person is the center of development.

In the 90's came the concept of sustainable human development focused on four critical elements: ELIMINATING POVERTY, CREATING JOBS AND SUSTAINING LIVELIHOOD, PROTECTING AND REGENERATING ENVIRONMENT AND PROMOTING THE ADVANCEMENT OF WOMEN. This has five aspects, which are as follows:

1. Empowerment which refers to expansion of men and women's choices and capabilities and the exercise of those choices free of hunger, want and deprivation, and increase in opportunities to participate in areas of activities that affect their lives
2. Cooperation which concerns the ways in which people work together, with a sense of purpose

- and meaning important for personal fulfillment and well-being
3. Equity which alludes to expansion of capabilities and opportunities to which everybody should have access
4. Sustainability which means that the needs of this generation must be met without compromising the right of future generations to be free from poverty and deprivation and to exercise their basic capabilities
5. Security which means that people need to be freed from threats, to have security of livelihood, to be free from disease and repression and from sudden disruptions in their lives.

Within the development sphere is governance. Governance itself has established a framework. First, it has expanded the meaning of governance to cover not only government institutions but also the private sector and non-government organizations inclusive of people's organizations, which lately have been referred to as the composite groups of civil society in addition to the religious organizations, academe and media. Secondly, it has instituted governance principles, namely: transparency, accountability, participation and rule of law. Thirdly, to carry out development efforts, areas of governance were established as economic, political and administrative governance.

#### Domains of Governance

Governance has enabling and facilitative roles in promoting sustainable development as follows:

1. Government Institutions – comprise all the three branches of government: executive, legislative and judicial. These are the very institutions that exert control, force, and the social contract that define citizenship. They are the ones responsible for public services and for creating an enabling environment for sustainable development.



Creating an enabling environment means establishing and maintaining stable, effective and fair legal-regulatory frameworks for public and private activities; ensuring stability and equity in the marketplace; mediating interests for the public good; and providing effective and accountable public services. In all these roles of government institutions, the goal is that of ensuring that concerns and needs of the poorest are addressed by increasing opportunities for people to seek, achieve and sustain the kind of life people aspire for.

2. **Private Sector** – is the primary source of opportunities for productive employment. Economic globalization has changed the way industries and enterprises operate. Equitable growth, gender balance, environmental preservation, and expansion of the private sector can enhance sustainable development.

3. **Civil Society** – composed of civil society organizations that channel people's participation into powerful social capital that influence public policies and gain access to public resources. They provide checks and balances on government power and monitor social abuses. In ensuring that all in society have a voice, democratic institutions ensure that the rule of law and societal norms are adhered to by different social forces of civil society.

#### Areas of Governance

1. **Economic Governance** is the decision making processes that affect a country's economic activities and its relationship with other economies that are focused on improving governance in all economic activities, including macroeconomic and microeconomic policy formulation, legal institutions and regulatory body, corporate governance, institutional reform

and private sector development. It has major implications for equity, poverty and quality of life.

2. **Political Governance** is the process of decision making to formulate policy and legislation. It includes political processes such as election administration, human rights, legal and judicial reform, and strengthening of non-governmental organizations and community groups.

3. **Administrative Governance** refers to the systems and processes of policy implementation in such areas as public sector restructuring, public-private sector partnerships in service delivery, privatization, outsourcing and contracting procedures, management information systems and decentralization of public services and process of budget preparation, execution and monitoring. Hence, a major key process under administrative governance is development planning and programming that is done at the national, multi-sectoral, sectoral, agency and local level.

#### Mainstreaming Human Rights in Governance and Development Processes

##### *What to Mainstream*

The RTD Shell Programme shall engage in various strategies to build capacities of government institutions and civil society, inclusive of all sectors of society (religious, academe, non-government organizations and people's organizations), for the protection and promotion of human rights in all their areas of activities and operations. To be principally mainstreamed in various fields of governance (to include economic, political and administrative), particularly in policy making, decision making, performance of legislations, regulations, development planning and programming, provision and protection of public goods, provision of public services, taxation, national security, defense, election

administration, administration of justice, environmental protection and preservation, local governance, are:

1. Observance and application of human rights principles, programmatic application of normative content of every right relevant to governance operations and development planning, determination of appropriate measures for the performance of state obligations to respect, protect and fulfill compliance with human rights standards, mapping out of entitlements and responsibilities of all sectors of civil society to include non-government organizations and people's organizations, in addressing development issues.
2. Promoting and enhancing gender perspective in governance and development, with special focus on the recognition of women's worth and equality with men complemented with protection policies; legislating and advocating against gender bias in employment, education, family affairs, land rights, credit services and other entitlements, discrimination in pay and incentives and violence and harassment; enhancing legal rights to increase level of women's capabilities and empowerment, better access to credit and other productive resources and increased political participation and representation.
3. Promoting the right to freedom of expression, which shall include freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or in print, in the form of art, or through any other media of his choice regardless of frontiers. Enhancement of the right and access to information is a prerequisite to promoting transparency, accountability and effectiveness in governance and development processes especially in cases where information affects public interests.

#### *How to Mainstream*

A rights-based approach (RBA) to development is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. Essentially, the rights-based approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development and governance.

The objective of a rights-based approach to governance and development implies understanding development as the economic, social, cultural and political process of working towards the universal realization of human rights and freedoms.

The norms and standards are those contained in the wealth of international treaties and declarations. The principles include equality and equity, accountability, empowerment and participation. A rights-based approach to development includes the following elements:

- Express linkage to rights
- Accountability
- Empowerment
- Participation
- Non-discrimination
- Attention to vulnerable groups

The distinctive feature of a rights-based approach is its legal foundation at the international, regional, and national levels. However, the edifice is incomplete, ratification has been inadequate, and few countries have translated international obligations into national legislation.

Capacities for a rights-based approach to development may be built through training, advocacy, research, constituency-building and other related strategies.



### Suggested Wider Applications of RBAD

As shown in the concept diagram, the RBA simply requires the application of human rights concepts, international and national human rights framework, notions of state obligations and entitlements and human rights principles that will guarantee greater accountability in governance and genuine empowerment and participation of the people.

As suggested, the RBA has direct application in the planning and programming processes of all institutions of government for economic, political and administrative governance. As a tool, the critical convergence of the Rights-Based planning and programming with the various governance and development processes should be able to raise the level of accountability among government institutions in relation to the application of human rights standards, nature and levels of state obligations and rights entitlement of the cross-section of the country's population that are embedded in the approach. This approach puts people at the center of whatever is the deliverable of a government agency or entity, be it an administrative policy, an economic policy, a piece of legislation, a functional electoral mechanics, a service delivery system, an interpretation of law, a judgment of a court case, a fiscal plan, a development program [infrastructure, agriculture, industrial, technological, education, training, etc.], a set of rules and regulations in political and civil service governance. The process involves direct linking of people's conditions and entitlements with government deliverables providing expansion of options, choices and freedoms for the fulfillment of human rights and human development.

### Framework for a Rights-Based Program of Government Commitments

The RBA will be most effective in development processes at the macro and micro levels. The approach may be applied at the agency, sectoral, intra-sectoral, multi-sectoral, national and local levels. However, these

plans should be effectively linked with the overall national and international human rights framework. To the end that international standards are progressively complied with, the formulation and development of human rights indicators and programming of annual performance commitments on the basis of the full use of the state's resources should be a prerequisite to development planning and programming at any level. The established indicators corresponding to the human rights standards and the committed annual performance targets of government for progressive realization of the standards should guide each and every government institution and agency to include the civil society toward the graduated and progressive realization of the standards.

The NEDA and the CHR may jointly undertake a project on the development of human rights indicators corresponding to the international standards prescribed under the treaties/covenants to which the Philippine Government is a state party. The development of these indicators should be a prerequisite to a systematic government-wide Rights-Based Approach to Development Planning and Programming. This undertaking should follow these rational steps:

1. Mapping out of the international and national human rights framework that should show an enumeration of rights commonly identified in major international human rights treaties and domestic laws with specifications as to the prescribed standards or normative contents;
2. Identification and clustering of government institutions/agencies, referred to as the duty holders, whose mandates are directly related to the fulfillment of each right;
3. Production of a compendium of existing indicators that support the international standard/normative content involving the cluster of government duty holders and representatives of civil society organizations;



4. Administration of baseline study on the level of enjoyment of a particular right by identified vulnerable and disadvantaged sectors, groups and individuals (rights holder) on the basis of the international standards/normative contents and the corresponding indicators established;
5. Gaps-Analysis between the baseline and the international standards on the basis of the established indicators, by cluster of agencies, with representatives from civil society organizations;
6. Consensus building on government's annual performance commitments in the short term and medium term (5-7 years) showing a programming of steps to comply with the international standards; the aggregate commitments of the agencies within the cluster should contribute to the attainment of the international standards; and target setting should be rationalized based on the maximum use of the country's resources; and
7. Government-wide adoption of the Rights-Based Planning Framework to serve as guide for the annual budget planning by agency (national/local) and reference guide for policy formulation and legislation, national resource allocation, and national and medium term development planning.

Right	Agencies Concerned	International HR Standards	HR Indicators	Baseline*	Programmed Commitments From Y <sub>1</sub> to Y <sub>n</sub> *
				V <sup>1</sup>	V <sup>n</sup>
				L A J P L A J J P L A J P	

- *Conditions of vulnerable/disadvantaged individuals/ sectors relative to enjoyment*

### Legislative Measures

### A - Administrative Measures

### Judicial Measures

### P - program Measures

## HR Mainstreaming in Development Planning and Processes

On the basis of the programmed commitments over a specified period [as proposed in Section A], various instrumentalities of government, including the executive, legislative and judicial branches, may translate the measures into specific national, local, sectoral policies, strategies and priority programs and targets as discussed in the following development processes:

### Mainstreaming of HR in Medium and Long-Term Development Planning<sup>9</sup>

The HR Mainstreaming Framework can be integrated in the Medium and Long Term Plan through: an assessment process using a Rights-Based Sectoral Efficiency and Effectiveness Review (SEER); consolidation of the situational analysis of the human rights sector, particularly the disadvantaged/vulnerable sectors; formulation of the sectoral policy framework; approval of the Framework by the Steering Committee; drafting of the sectoral plans and strategies; convening of Screening Committee to discuss, review and approve action plan, dissemination of approved sectoral plans/strategies; and monitoring of the implementation of sectoral plan and strategies

*Linking and Integration with other National Sectoral/Agency/ Local Plans*<sup>10</sup>

In the preparation/updating of the Philippine Medium Term Development Plan (MTPDP), the Lead and Cooperating Agencies sitting in the various NEDA Planning Committees shall ensure a process of integration and/or harmonization of the HR Mainstreaming Framework into the following MTPDP Sectors: social reform development; agriculture, agrarian reform and natural resources; infrastructure development; governance and institutions development; macro-economic framework and financing; and others.

Meanwhile, the HR mainstreaming framework may, likewise be adopted and integrated, in whole or in part,



and/or harmonized in the preparation/updating of the Short and Medium Term Plans and Annual Budget Planning of the Lead and Cooperating Agencies.

Also, HR principles, normative content of rights, and nature and levels of state obligations and claim-holder entitlements should influence and or guide planning, programming and budgeting of specific programs, projects and activities.

#### **Application of HR and Gender Perspective in other Government Processes**

This will require, firstly, the use or consideration of the HR Mainstreaming Framework in Legislative Review and Formulation by the Congress, National Policy Review and Formulation by the Executive Branch, National Budget Call and Deliberation Process of the DBM, Governance Review by the Civil Service Commission and Commission on Audit, and human rights and gender sensitive judicial processes. Secondly, it will require the use and consideration of the HR and Gender Mainstreaming Framework in local governance processes such as issuance of resolutions and ordinances, local development planning and budgeting of programs and services, and others.

#### **RBA Models in Development Programming**

##### *1. Rights-Based Country Plan for the Urban Poor<sup>11</sup>*

Consistent with this framework, the Philippine Commission for the Urban Poor (PCUP) submitted for consideration by the NEDA and the UNDP a proposal adopting a rights-based approach to the formulation of the Country Plan for the Urban Poor. In consultation with the Commission on Human Rights under the Urban Poor Sectoral Working Group, a framework plan was drawn up to advocate for the mainstreaming of urban poor issues, especially the promotion of their rights to various government initiatives for the urban poor. Included in the mainstreaming efforts are the incorporation of monitoring mechanisms targeted

towards national government agencies, local government units and civil society organizations.

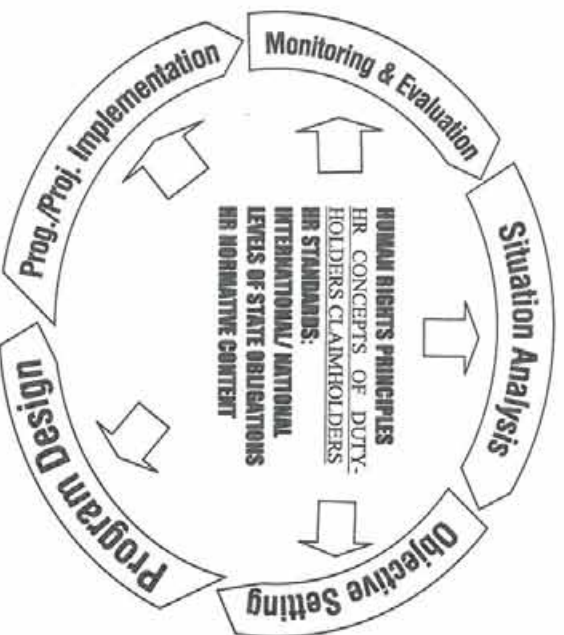
The Country Plan aims to draw up a rights-based update of the statistics of the urban poor, a review of existing literature on legislative, administrative and executive issuances affecting the urban poor, and the formulation of Human Rights-Based Local Plans and their mainstreaming in a Rights-Based Country Plan for the Urban Poor. Such undertaking shall involve the development of Framework, Guidelines and instruments, consultations on the various human rights issues affecting the urban poor vis-à-vis human rights principles, normative content of every right, state's obligations, mapping out of entitlement and responsibilities of rights holder, and mapping out of obligations of duty holders to include various instrumentalities of government and non-state actors. Thereafter, development planning shall ensue at the national and local levels using human rights standards for objective setting, benchmarking, programming and designing for monitoring and evaluation. Identified to participate in this endeavor are the PCUP, National Anti-Poverty Commission (NAPC), Department of the Interior and Local Government (DILG), Housing and Urban Development Coordinating Council (HUDCC), National Housing Authority (NHA), Coalition of Urban Poor Organizations, Non-Government Organizations and Local Government Units.

##### *2. RBA Model for Development Programming in the Informal Sector<sup>12</sup>*

On the occasion of the 8<sup>th</sup> National Occupational Safety Congress on October 23-24, 2002, the CHR presented a paper that approximates the application of the Rights-Based Approach in sensitizing development programs for the informal sector, using human rights both as criteria and components of the development planning and programming processes. The model is presented in Fig. 2 below:



Figure 2  
A Rights-Based Approach Model for the Informal  
Sector's Development Program



#### a. Situation Analysis from a Rights Perspective

As applied to the informal sector, the RBA provides a multidimensional analysis of development issues affecting the sector. Various human rights concerns and issues of the sector are examined, such as occupational health issues, work hazards and poor safety conditions of their work places that are linked to poverty and survival needs. These problems and issues are further defined and classified according to the pertinent rights of the sector being violated or transgressed. Take, for instance, problems involving the right to be protected against dangers of injury, sickness or death through safe and healthful working conditions. Pertinent national laws and international standards on reasonable working conditions may be applied, such as those concerning employment of minors, use of dangerous substances in work place, emergency occupational health personnel and facilities, appropriate personal protective equipment

and safety and health information to workers, among others. A major factor in the analysis of these issues and problems are state obligations to respect, protect and fulfill the rights of the sector that should be linked also with the normative content of the right to health. Questions to be raised are whether or not occupational health and safety rights are complied by the state or government and what government agency or non-state actor should be held responsible for compliance or for violations, if there are violations? Why the government? Because the government is the State party that should comply with the Conventions and Treaties on labor.

#### b. Formulation of Objectives from a Rights Perspective

At this stage of the development programming process, desired changes in the work and life conditions of the informal sector are set. As mentioned earlier, the means to improve the conditions of the workplaces of the informal sector could not be segregated from the concern to improve life conditions of the community where they reside. All stakeholders, namely, the duty holders and the rights claim holders, participate in objective setting. These objectives are further specified in terms of outcome and process indicators. The outcome refers to the desired changes in the quality of life of the informal sector in the context of the complex nature and life conditions of the sector, and should reflect the application of international standards on occupational safety and health and linked with the normative content of the right to health. Such indicators should be formulated with reference to conditions particular to men and women, children, and other forms of vulnerability of the informal sector. Process indicators should indicate increase in the level of accountability of duty holders and greater participation and empowerment of the rights claim holders, and should describe necessary conditions for nondiscrimination and equality, equity, attention to vulnerable groups, good governance, and legislative capacity, among others.



#### c. Designing Developmental Programs from a Rights Perspective

Under this process, both the duty holders and rights claim holders identify the means to attain their objectives to improve the occupational safety and health of the informal sector. Development plans that may be identified are policies or legislations for the kind of protection desired to improve the occupational health and safety of the workplaces of the informal sector, programmes that define the means whereby a set of activities and programming of resources will be undertaken at a given timeframe to include participation scheme for both duty holders and rights claim holders. In development planning, the rights being fulfilled, as well as the human rights principles and obligations being addressed, are identified in the process. Policies, programmes and projects identified should show a progression in the attainment of the target outcome of improved level of health and safe working conditions for the informal sector. In such case, capacity-building strategies that will equip both the duty holders and rights claim holders to address issues and problems on occupational health and safety in the workplaces of the sector must be prioritized.

#### d. Implementation of Developmental Programmes from a Rights Perspective

Individuals, organizations, groups and communities comprising the informal sector should be capacitated to implement development programs consistent with the human rights principles of participation and empowerment. Also, the duties and accountabilitys of government agencies should be performed with a high degree of accountability, transparency and responsiveness to the needs of the informal sector, thus ensuring the rule of law, non-discrimination and equality, equity, and non-violation of rights. At this crucial stage of implementation, government and non-government organizations managing the programs should be

conscientious in empowering the informal sector both as participants and beneficiaries of the development initiative. As development managers, they should ensure the maximum level of participation and full exercise of the programmed responsibilities of the participating individuals and groups.

#### e. Monitoring and Evaluation from a Rights Perspective

Both content and process indicators should be formulated for the monitoring and evaluation of development programs. From a human rights perspective, content indicators refer to impact that reflects changes in the status and level of enjoyment of the right to occupational health and safety and its multiplier effects on social, economic, environmental, political, cultural and other developmental aspects in the lives of the informal sector resulting from the developmental programs and projects. For example, a home-based industry with support system for technical assistance and health services should be evaluated in terms of the physical changes in the work environment as indicative of healthy and safe occupational and living conditions of home-based workers. Such changes in the work conditions guarantee sustainability of the economic activity that yields a stable source of livelihood and the empowerment to participate in other social, political and cultural dimensions of life.

On the other hand, process indicators refer to how the government duty holders and rights claim holders perform their respective responsibilities in the attainment of the content indicators. For this type of indicator, data and information should be gathered and analyzed as to how government performs delivery of assistance and services, particularly in meeting the standards for workplace sanitation and protective and promotive devices for occupational health and safety. This type of indicator should also show how the concerned groups of the informal sector participate in the data gathering and analysis of data and information on the benefits



derived from government's assistance and services. The results of the monitoring and evaluation of development programs should serve as valuable inputs in determining how far or near the work and life conditions of the informal sector are to the desired level of conditions based on international and national standards. The same results could be the basis for the identification and development of other development programs that would progressively address the need of the informal sector for healthy and safe work and life conditions.

### Role of the CHR in the RBA Agenda on Governance and Development<sup>23</sup>

National human rights institutions are primarily the source of human rights information for the government and the people of the country. They are established to assist in educating public opinion and promoting awareness of and respect for human rights, to study and keep under review the status of legislation, judicial decisions and administrative arrangements for the promotion and protection of human rights, and to consider, deliberate and advise government on any particular state of affairs that may exist nationally in connection with the duties of the state under the various human rights treaties. These standards and goals, as far as the Philippine Commission on Human Rights is concerned, are embodied in the 1987 Philippine Constitution. It is mandated to perform investigative, recommendatory, educative and monitoring functions in relation to human rights protection and promotion. As the mandates imply, the Commission should make itself accessible to public authorities of government and wide cross-sections and parts of the country's population referred to as the civil society, in regard to human rights protection and promotion.

At present, the Philippine Government is considering major development issues that converge with the issues of human rights. Under the GOP-UNDP Country Cooperation Framework, four development portfolios are identified to be most pressing. These are 1) poverty; 2)

peace and development; 3) good governance; and 4) environment sustainability. These four agenda are cross-cutting, but the agenda on good governance appears to be the most critical as it focuses on providing the enabling environment and national capacity for the other agenda. Good governance is concerned with capacitating the key stakeholders, namely, government institutions, private sector, civil society and media, in effecting sustainable development in the country.

Principally, the task involved is to mainstream human rights, inclusive of emphasis on gender and right to information, in governance and development. As an oversight agency on human rights, as an independent office, and as a member in assisting capacity to the governance and institution development sector of the Medium Term Philippine Development Plan and executing agency of the Right to Development Shell Programme of the Good Governance Portfolio, the Commission on Human Rights presents its role, as follows:

#### *In Relation to Government*

The Commission acts as the external advisor and prescriber of human rights protection and promotion standards. It is also an independent monitor, evaluator and position advocate on human rights in relation to human rights laws, policies, programs and performance. In relation to capacity building under the good governance portfolio and three other portfolios of the GOP-UNDP, the Commission takes the lead in transforming government institutions into human rights and gender responsive bodies. The transformation necessitates increasing the level of awareness of government institutions of the human rights concepts, standards and the constituent elements of the Rights-Based Approach to Development to specific processes and activities of these institutions in the performance of their respective mandates, e.g., human rights content of legislations, policies and programs; human rights implications of development programs relative to



## Endnotes

<sup>1</sup> *Journal of Extension*, July 1983, Volume 21 No.4.

<sup>2</sup> A Training Manual on Rights-Based Approach.

<sup>3</sup> A Training Manual on Rights-Based Approach: Module II, Section 3 - Normative Content of Human Rights.

<sup>4</sup> A Training Manual on Rights-Based Approach: Module II, Section 4 - Human Rights Obligations National Human Rights Institutions at Work, Readings Manual (Workshop with the Concept of State Obligations in Relation to ESR), Regional Workshop on Economic, Social and Cultural Rights (Manila, Philippines, November 5-10, 2000).

<sup>5</sup> Matthew C.R. Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development*, Oxford: Clarendon Press, 1995, p. 170.

<sup>6</sup> CESCR, General Comment 3, The nature of States parties obligations (Art. 2, para. 1 of the Covenant) (Fifth Session, 1990), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/ Rev.1 (1994), para. 11.

<sup>7</sup> *Ibid.* para.12.

<sup>8</sup> *Ibid.* para.9.

<sup>9</sup> Mainstreaming of Human Rights into the Country/ National/ Local Plans for the Vulnerable Sectors.

<sup>10</sup> *Ibid.*

<sup>11</sup> PCUP's Rights-Based Country Plan for the Urban Poor.

<sup>12</sup> Excerpts from "RBA for Developmental Programs in the Informal Sector", Paper Presented by the Chairperson on the occasion of the 8<sup>th</sup> National Occupational Safety Congress, October 23-24, 2002.

<sup>13</sup> Excerpts from Opening Remarks of the CHR Chairperson in the RBA Training for Governance Portfolio, November 25, 2002.

compliance with international standards; advice and assistance in the implementation of the normative content of every right contained in the international standards particularly in the development planning and programming of the government. As a general intervention of the CHR under the GOP-UNDP Portfolio, it may assist government institutions in crafting, under their respective shell programs, human rights orientation and training with emphasis on international and national human rights standards and a Rights-Based Approach which are applicable to the day-to-day operations of the institutions.

### *In Relation to Civil Society and Media Sector*

The Commission serves as partner, mobilizer, coordinator and educator of civil society in general. Under the Good Governance Portfolio, it acts as catalyzer and conduit of programs and projects that will enhance human rights awareness and strengthen initiatives and capacities of non-government organizations, people's organizations, media and other civil society organizations.

As an influential sector of society, the media is a strong instrument for either empowerment or repression. As such, the role of the media in promoting human rights is very vital. To be a useful partner in human rights promotion, the media, as part of the civil society, should have increasing awareness of the human rights framework and its application to their day-to-day operations. Under the Good Governance Portfolio, the Commission should be able to develop with the sector the areas of promotional programmes that would benefit from media involvement, such as educating the public about human rights, dissemination of human rights information, etc.

## References

- A Training Manual on Rights-Based Approach.
- A Training Manual on Rights-Based Approach: Module II, Section 3 - Normative Content of Human Rights.
- A Training Manual on Rights-Based Approach: Module II, Section 4 - Human Rights Obligations, National Human Rights Institutions at Work, Readings Manual (Workshop with the Concept of State Obligations in Relation to ESR), Regional Workshop on Economic, Social and Cultural Rights, Manila, Philippines, November 5-10, 2000.
- CESCR, General Comment 3, The nature of States parties obligations (Art. 2, para. 1 of the Covenant) (Fifth session, 1990), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 (1994), para. 11.
- Craven, Matthew C.R. (1995) *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development*, Oxford: Clarendon Press.
- Journal of Extension*, July 1983, Volume 21 No.4
- Mainstreaming of Human Rights into the Country/ National/ Local Plans for the Vulnerable Sectors.
- Opening Remarks of the CHR Chairperson in the RBA Training for Governance Portfolio, November 25, 2002.
- PCUP's Rights-Based Country Plan for the Urban Poor.
- "RBA for Developmental Programs in the Informal Sector", Paper Presented by the Chairperson on the occasion of the 8<sup>th</sup> National Occupational Safety Congress, October 23-24, 2002.



## APPLYING HUMAN RIGHTS TO DEVELOPMENT: COMMISSION ON HUMAN RIGHTS' ACTION FRAMEWORK ON THE RIGHTS-BASED APPROACH TO DEVELOPMENT AND APPLICATIONS IN THE COMMISSION'S OPERATIONS AND ACROSS INSTITUTIONS\*

### Rationale for the Rights-Based Approach

*Philippine Obligations to Implement Human Rights Standards*

The Philippines is a state party to about 23 international human rights instruments under the UN system. It has the obligation to implement human rights standards enunciated in the various instruments it has acceded to. It is through the observance of these human rights standards that expanding choices and opportunities of the poor and vulnerable sectors of the society could be realized under the development process, which is, in effect, the central purpose of development.

### Need for Rights-Based Governance and Development Management

Human rights and development are interdependent and mutually reinforcing spheres working towards the same goal of expanding opportunities for human development. Over the past decades, the desired mutual reinforcement of these two spheres in terms of full realization of human rights has not been achieved. Development has not served the purpose of fully unleashing human potentials and growth. Poverty persists, registering at 31.8 % of the country's population as of 2000. Poverty is defined in terms of degrees of deprivation as to food, housing, education, health and access to all other social services that inhibit the poor

\* Commission on Human Rights of the Philippines, "Design Report on Rights-Based Approach to Development", 2003.



from attaining their development to a standard befitting a human being with inherent dignity.

Governance manages development. It plays a major role in determining the plight of the great majority of the Filipino people and in providing equal opportunity for sound human development. But failures in governance are seen in economic inequity, unequal access to opportunity and services, social stratification, and physical development inequality. While the development of the country is said to have been pursued vigorously through various innovative governance approaches that should have high impact on the poor population, various conflicting interests, bureaucratic dysfunctions, policy weaknesses and deficiencies, and issues of integrity and accountability characterize the whole gamut of governance and contributes to imbalances in development.

This brings to fore the importance of consciously and deliberately mainstreaming human rights standards into the development and governance framework. These standards should guide governmental and non-governmental institutions in the pursuit of its human development mission. At the same time, they should be considered as the barometer of government performance for which government can be held accountable to its public.

#### Areas of Application

##### 1. *RBA Applications in Key CHR Functions and Activities*

- Investigation
- Legal
- Financial Assistance
- Visitorial Services
- Information, Education and Training
- HR Development Planning

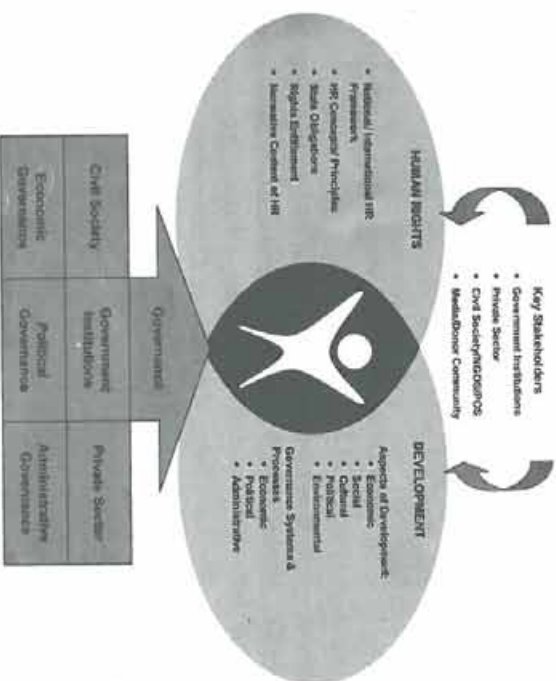
##### 2. *Wider Application of RBA for Convergence of Development and Human Rights*

- Right to Development Mapping of Government Agencies
  - Rights-based Mapping of Civil Society Organizations
  - Rights-based Situation Mapping
  - Rights-based Entitlements and Participation Mapping
  - Duty Holders' Analysis and Obligations Mapping
  - Rights-based Policy Analysis
  - Rights-based Program Development
  - Rights-based Development Programming
  - RBA in development of projects and writing a proposal
  - Programmatic Application of the Normative Contents of Human Rights
  - Rights-based Governance Orientation Mapping
  - Rights-based Impact Assessment
- ##### 3. *Process Design for RBA in Development Planning and Budgeting, Legislation and National Action Planning*
- Mainstreaming Human Rights Indicators into the Public Resource Sectors
  - RBA in National/Sub-National/Sectoral and Agency Planning
  - RBA in National Budgeting Process
  - RBA in Local Planning and Budgeting/Area Planning
  - RBA in Legislation /Policy Analysis
  - RBA in National Action Planning

## RBA Framework in Development and Governance

The application of RBA in development and governance activities will adopt the following RBA action framework, which was drawn from the various consultations conducted by the CHR with government and civil society under the GOP-UNDP Governance Portfolio.

Figure 1  
RBA FRAMEWORK IN DEVELOPMENT AND GOVERNANCE



As a member of the UN Family and as state party to about 23 human rights instruments, the Philippines is bound by its obligations to respect, protect and fulfill the universal standards on human rights that are contained in the instruments. However, upon ratification of these instruments, no systematic and progressive steps have been taken to apply the concrete sets of human rights standards in the development and governance activities of government. To a limited extent, these standards and instruments are invoked invariably by

government and non-government organizations on selected occasions but there is obvious lack of comprehensiveness in the commitment, implementation and enforcement of the human rights standards to which the Philippines has acceded.

As a national human rights institution under the UN system, the Commission on Human Rights (CHR) is duty bound to assist the government in taking steps to implement the universal human rights standards and, likewise, monitor and assess these steps and measures independently. This is the same mandate given to the CHR under the 1987 Philippine Constitution tasking the Commission to monitor compliance of the Philippine Government with international human rights treaties and obligations.

The implementation and enforcement of these human rights standards have become a major consideration in the sphere of development. While human rights and development have been linked over the past decades, and recently through the UN Declaration of the Right to Development, not much gains could be accounted as human rights standards in the declaration and other human rights instruments remain unobserved by key instrumentalities of government. With poverty incidence of 34.9%, which has shown increasing trend over the past years, it could be deduced that, indeed, the country's so-called development gains are not founded on human rights. The every day reality of poverty among the rural poor and urban poor in the country shows the absence of development. There can be no genuine development in a country where a great number of its people are wallowing in poverty. In human rights context, poverty is a human rights violation. People in deep poverty lack options and opportunities to develop themselves, and therefore are in no position to participate in, contribute to, and enjoy economic, social, cultural and political development. Under the Declaration of the Right to Development, these are individual and collective inalienable rights.

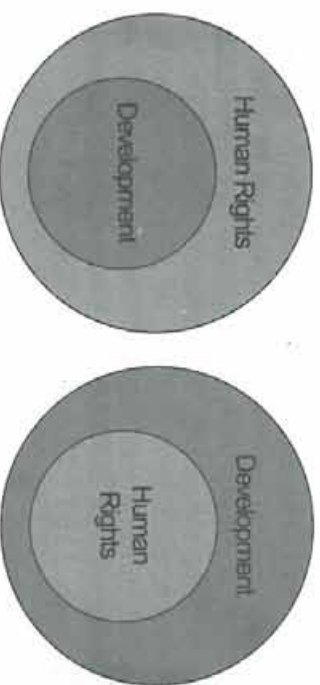


Under the declaration, development should be able to provide the processes and enabling environment in which all human rights and fundamental freedoms can be fully realized. While the UN has made pronouncements on a rights-based development, over the decades, human rights and development have been independently and separately working under their respective frameworks, processes and approaches.

Development and human rights are two separate spheres that need to converge operationally. Under the Declaration on the Right to Development, the economic, social, cultural and political development processes should enable the full realization of human rights and freedoms. It would appear that development is a subset of human rights or a small circle within the human rights circle, which serves as the framework. The other school of thought places human rights as the sub-set of development (Figure 2). These contentious views were raised in a consultation with human rights practitioners and experts in December 2003.

As shared in this consultation, human rights should serve as the framework, but realities point to the fact that this is not the case. It is human rights which appears as the small circle within a bigger circle, which is development. The very little resources allocated to human rights are considered indications of lesser commitment to human rights by the government. Thus,

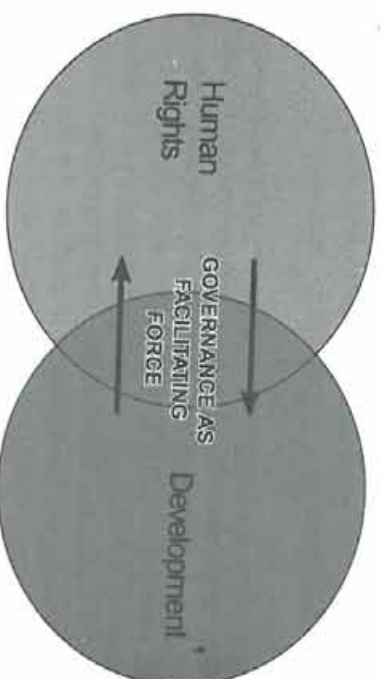
Figure 2  
HUMAN RIGHTS AND DEVELOPMENT



as agreed during, the same consultation, an action framework with human rights and development represented by two spheres, be adopted; however, it is to be treated as a work in progress towards full convergence into just one circle (Figure 3).

The total convergence of the two spheres shows full mainstreaming of human rights into development through the RBA in governance and development processes and activities. The total convergence means that the human rights framework and principles, concepts of rights entitlements and state obligations, and normative content of every right are applied systematically and methodically to development and governance processes at the strategic development

Figure 3  
CONVERGENCE BETWEEN HUMAN RIGHTS AND DEVELOPMENT



planning, policy and legislation, administrative functions, programs, and services delivery levels.

To facilitate convergence, agents of both spheres should be fully enlightened on the framework, principles, approaches and processes of human rights and development. Governance should serve as the entry point for convergence of human rights and development. It is through governance that key decision-making is

done, where human rights framework, standards, approach and methods should work, as in the following governance activities.<sup>1</sup>

#### *Economic Governance*

1. Economic Governance involves policies and processes that determine the overall levels and distributive equity of economic opportunity and income, and would therefore have profound human rights implications.

Government policy and program implementation decisions in such areas as macro-economic policies (fiscal, monetary, expenditures, foreign trade), microeconomic policies and programs (industry development, sectoral development and program prioritization, labor management), government regulation and corporate governance have profound effects on individual and collective rights.

Such issues as reconciling long-term gains versus short-term sacrifices in foreign trade policy formulation, for example, have extremely important human rights considerations that should be factored into the decision making process. Most of the time, long-term economic objectives adversely impact on the poor in the immediate term. The application of RBA in the policy formulation and management processes would ensure that policy makers provide safety nets for those who suffer the immediate term consequences.

#### *Political Governance*

2. Political Governance is the process of decision making to formulate policy and legislation. It includes political processes such as election administration, human rights, legal and judicial

reform, strengthening of non-governmental organizations and community groups.

#### *Administrative Governance*

3. Administrative Governance refers to the establishment and proper maintenance of formal institutional structures, systems and processes through which government operates by formulating, implementing and evaluating policies and programs. Administrative governance involves such processes as establishing the appropriate structure of the government's administrative machinery, defining government-private sector roles in the production and delivery of public goods, designing the processes and infusing technologies as well as resources in the enforcement of rules, settlement of conflicts and delivery of public goods and services, and providing mechanisms for participation, public information and feedback and accountability.

The mode by which government provides and delivers public goods and services impacts on human rights in terms of accessibility, equality, fairness, timeliness and non-discrimination effects of such provision and delivery mechanism and therefore is an important subject of RBA.

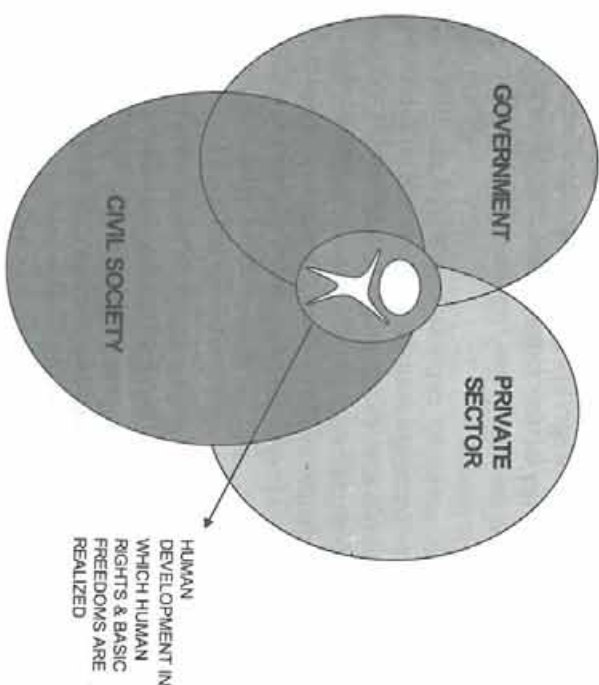
The matrix in Figure 4 summarizes the different areas of work under each aspect of governance where mainstreaming of human rights could be enhanced for expanding people's opportunities for enjoyment of human rights and basic freedoms. With governance facilitating the convergence of human rights and development, the focus would be the capacitation of all governance functions through the three (3) key stakeholders (Figure 5).



## Human Rights Conceptual Framework

*The Core Purpose of Governance from a Rights Perspective*  
The proposed RBA application is founded on the notion that the purpose of governance should be seen from a rights perspective (Figure 6).

**Figure 6**  
**THE CORE PURPOSE OF GOVERNANCE  
FROM A RIGHTS PERSPECTIVE**



## The RBA Approach and its Application

### Key Features of the Approach

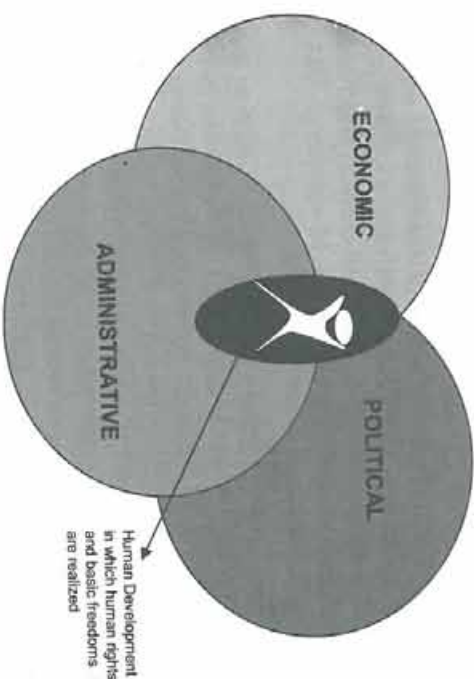
On the basis of the RBA Action Framework, this design report suggests the following key features of the RBA approach:

1. RBA facilitates convergence of human rights and development, with the former providing the

**Figure 4**  
**MATRIX OF GOVERNANCE FUNCTIONS**

ECONOMIC GOVERNANCE	POLITICAL GOVERNANCE	ADMINISTRATIVE GOVERNANCE
Macro & Micro Economics Policy Making	Policy & Legislation	Public Sector Restructuring
Regulatory functions of legal and regulatory bodies	Electoral Administration	Public-Private Sector Partnership in Service Delivery
Institutional Reform and Private Sector Development	Political Processes	Public Sector Institutional Reform, Decentralization of Public Services
Corporate Governance	Legal & Judicial Reform	Budget Preparation, Execution and Monitoring
	Strengthening of Non-Government Organizations	Privatization, Outsourcing & Contracting
	Participation and Empowerment of Community Groups	Development Planning and Programming

**Figure 5**  
**GOVERNANCE FACILITATING THE CONVERGENCE  
OF HUMAN RIGHTS AND DEVELOPMENT**



criteria and standards and the latter providing the processes.

2. RBA works through different areas and functions of governance as the critical entry point for RBA application in the management of the comprehensive economic, social, political and cultural processes of development.
3. The convergence between human rights and development, which is facilitated through the RBA, provides the conceptual framework for the process of human development that places people at the center of sustainable development.
4. The RBA integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development.
5. RBA seeks to capacitate all stakeholders of governance, primarily government institutions and civil society as well as private sector, on the promotion and protection of human rights specifically in the fields of economic governance, political governance and administrative governance.

#### *How RBA Works in Governance and Development*

RBA facilitates the linkage between human rights and governance and development through the following:

1. Expressly linking any or all governance functions, programs and projects with human rights:
  - economic
  - political
  - administrative
2. Translating in operational terms HR principles, concepts, national and international standards and norms and their integration into the development plans, policies, programs and delivery processes of governance and development

3. Programmatically applying national and international human rights standards and norms into governance decision making, policy formulation and development, legislation, administrative issuances, development and fiscal planning, program, project and enterprise development

4. Applying the concepts of state obligations, duty holder for both state and non-state actors, claimholder for people's rights entitlements, and progressive realization of national and international human rights standards and norms in organizational/institutional planning, review, audit and problem and situation diagnosis, etc.

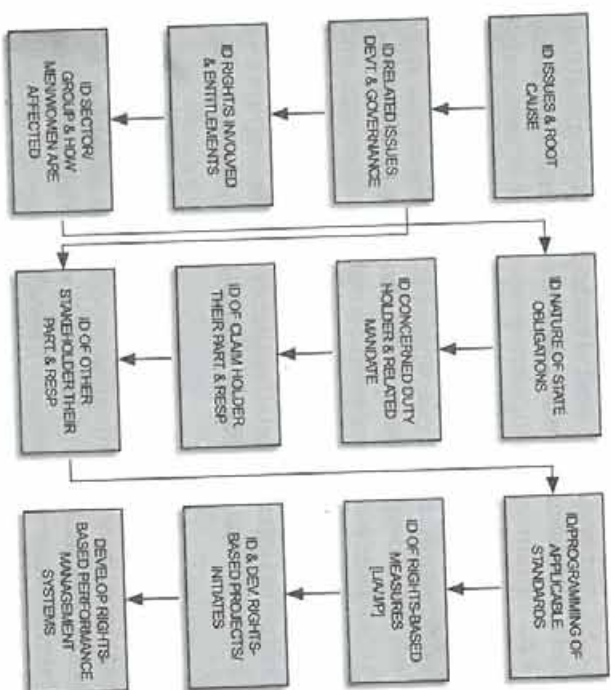
#### **How RBA is Applied**

RBA is applied in the various aspects of governance and development through a process that identifies the issues and analyzes their root causes, identifies the claimholders and defines how they are specifically affected by the issues in terms of their human rights, defines the duty holders and the roles each has played in bringing about the issues and their root causes, defines the specific rights involved and the nature of state obligations that are concerned and the standards against which the performance of the duty holders can be gauged, defines the necessary initiatives that are required to address the issues and establishes the measures by which the effectiveness of such measures can be evaluated.

This process provides the core methodology for any intervention that the CHR or the concerned government or private institution should take in ensuring that RBA is applied in their respective operations (Figure 7).



Figure 7  
RBA APPLICATION PROCESS



### Endnotes

<sup>1</sup> Draft RTD Action Framework, Commission on Human Rights, December 2002.

S

## ABOUT THE BOOK

This Source Book on Human Rights is a collection of articles, conference and workshop papers, and book chapters, as well as documents and covenants which spell out human rights concepts and principles and try to translate these into practical reality. It is an initial attempt to put together a body of knowledge which can serve as a basic reference material for students, academics, national and local government officials, civil society organizations and other stakeholders and interested parties. This effort is intended to make a modest contribution to the ongoing discussions on people-centered development, in which human rights are an important if not indispensable component.

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